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REPORTS OF CASES
DECIDED IN THE
COURT OF APPEAL,
DURING THE YEAR 1893.

REPORTED UNDER THE AUTHORITY OF
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OF THE
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

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A TABLE

OF THE

CASES REPORTED IN THIS VOLUME.

A.	Page	C.	Page
Ætna Ins. Co., Ardill et al. v.	605	Canada Southern R. W. Co.,	
Allen v. Furness	34	Water Commissioners of the	
Allison v. McDonald	695	City of Windsor v	388
Archibald et al., Humphrey v.	267	Canadian Pacific R. W. Co.,	
Ardill et al. v. Ætna Ins. Co.	605	Hollinger v.	244
“ “ v. Citizens' Ins. Co.	605	Central Bank of Canada v.	
Ashbridge, Hill v.	44	Ellis et al.	364
Assignments and Preferences		Citizens' Ins. Co., Ardill et al. v.	605
Act, Section 9, In re	489	Clark, McLean v	660
Aitken, Bank of Hamilton v.	616	Connell v. Town of Prescott	49
Attrill, Huntington v.	Appendix	Corridan v. Wilkinson	184
		Crain et al. v. Rapple.	291
		Crooks v. Ellice	225
B.		D.	
Balfour, Macdonald v.	404	Devins v. Royal Templars of	
Baskerville v. Canada Atlantic		Temperance.	259
R. W. Co.	108	Dickson et al., Walker v.	96
Baskerville v. City of Ottawa		Dunsford v. Michigan Central	
et al	108	R. W. Co	577
Beaver v. Grand Trunk R. W.			
Co. of Canada	476	E.	
Benjamin, Ostrom v.	336	Ellice, Crooks v	225
Bergin, Purcell v.	535	“ Hiles v.	225
Breithaupt v. Marr.	689	Ellis, Central Bank of Canada v.	364
Brown v. Moyer	509	Erdman v. Town of Walkerton.	444
C.		F.	
Campbell and the Village of		Farquhar et al. v. City of	
Lanark, In re	372	Hamilton et al	86
Canada Atlantic R. W. Co.,			
Baskerville v.	108		

E.		L.	
	Page		Page
Forbes v. Michigan Central R. W. Co., In re	584	Lanark, Village of, Campbell and, In re	372
Fox v. Williamson	610	Lawson v. McGeoch et al	464
Frank v. Sun Life Assurance Co. of Canada.....	564	Lemesurier v. Macaulay	421
Furness, Allen v.....	34		
G.		Mc.	
Gilmour & Co. v. Bay of Quinte Bridge Co	281	McCauley, Mitchell v.....	272
Gordon, Manufacturers' Life Ins. Co. v.....	309	McDonald, Allison v	695
Gould v. Hope, In re.....	347	McGeachie v. North American Life Assurance Co	187
Grand Trunk R. W. Co. of Canada, Beaver v	476	McGeoch et al., Lawson v	464
Grand Trunk R. W. Co. of Canada, Weegar v	528	McLean v. Clark.....	660
H.		McWilliam, Sullivan v	627
Hager v. O'Neil et al.....	198	M.	
Haggert Brothers Manufacturing Co. (Limited), In re	597	Macaulay, Lemesurier v	421
Hamilton, Bank of, v. Aitken.	616	Macdonald v. Balfour.....	404
" " Henderson v.	646	Manufacturers' Life Ins. Co. v. Gordon.....	309
" City of, Farquhar et al. v.....	86	Marr, Breithaupt v.....	689
Hay, Thompson v., In re.....	379	Mason v. Johnston	412
Hazen, Regina v.....	633	" v. Town of Peterborough	683
Hendersen v. Bank of Hamilton	646	Michigan Central R. W. Co., Dunsford v	577
Herrington, Howard v	175	Michigan Central R. W. Co., Forbes v., In re	584
Hiles v. Ellice.....	225	Mitchell v. McCauley.....	272
Hill v. Ashbridge	44	Moyer, Brown v	509
Hogan, Holliday v.....	298	Murray, Turner v	690 (n.)
Holliday v. Hogan.....	298	N.	
Hollinger v. Canadian Pacific R. W. Co	244	New Hamburg, Village of, v. County of Waterloo	1
Hope, Gould v., In re.....	347	North American Life Assurance Co., McGeachie v.....	187
Howard v. Herrington	175	O.	
Humphrey v. Archibald et al.	267	Oelrichs v. Trent Valley Wool-len Manufacturing Co.	673
Huntington v. Attrill .. Appendix.		Olver and the City of Ottawa, In re.....	529
J.			
Johnston, Mason v.....	412		

O.		T.	
	Page		Page
O'Neil, Hager v	198	Thompson v. Hay, In re	379
Ostrom v. Benjamin	336	Toronto, City of, Price and, In	
Ottawa, City of, Baskerville v.	108	re	16
“ City of, Olver and,		Toronto, The City of, and The	
In re	529	Toronto Street Railway Com-	
		pany, In re	125
		Toronto, City of, Virgo and, In	
		re	435
		Toronto Street Railway, To-	
		ronto, City of, and, In re ..	125
		Trent Valley Woollen Manu-	
		facturing Co., Oelrichs v ..	673
		Trust and Loan Company of	
		Canada v. Stevenson et al. .	66
		Turner v. Murray	690 (n.)
		Tyrrell v. Senior	156
P.		V.	
Peterborough, Town of, Mason		Virgo and the City of Toronto,	
v.	683	In re	435
Potter, Regina v	516		
Prescott, Town of, Connell v ..	49		
Prittie, Scottish American In-			
vestment Co. v	398		
Pryce, and the City of Toronto,			
In re	16		
Purcell v. Bergin	535		
Q.		W.	
Quinte, Bay of, Bridge Co.,		Walker v. Dickson et al.	96
Gilmour v	281	Walkerton, Town of, Erdman v.	444
		Water Commissioners of the	
		City of Windsor v. Canada	
		Southern Railway Company	388
		Waterloo, County of, Village of	
		New Hamburg v.	1
		Weegar v. Grand Trunk Rail-	
		way Company of Canada ..	528
		Wetlaufer v. Scott	652
		Wilkinson, Corridan v.	184
		Williamson, Fox v	610
R.		Y.	
Rapple, Crain et al. v	291	Young v. Saylor	645
Regina v. Hazen	633		
“ v. Potter	516		
Royal Templars of Temperance,			
Devins v.	259		
S.			
Saylor, Young v	645		
Scott, Wettlaufer v	652		
Scottish American Investment			
Company v. Prittie	398		
Senior, Tyrrell v	156		
Stevenson et al., Trust and			
Loan Company of Canada v.	66		
Sullivan v. McWilliam	627		
Sun Life Assurance Company			
of Canada, Frank v.	564		

TABLE

OF THE

NAMES OF CASES CITED IN THIS VOLUME.

A.

Names of Cases Cited.	Where Reported.	Page of Vol.
Adams and Kensington Vestry, In re...	27 Ch. D. 394	38, 39, 42
Adnam v. Earl of Sandwich.....	2 Q. B. D. 485.....	73
Alchin's Trusts, In re	L. R. 14 Eq. 230.....	162
Aldous v. Hicks.....	21 O. R. 95.....	99, 209
Allan v. Clarkson	17 Gr. 570	466
Allegheny v. Black's Heirs.....	99 Pa. St. 152	28
Allen v. Charlestown.....	109 Mass. 243	21
“ v. Aldridge	5 Beav. 401	337, 339, 345
Alsop v. Bell.....	24 Beav. 451	424
Anderson v. Anderson	L. R. 13 Eq. 381.....	561
“ and Barber, re	13 P. R. 21.....	360
“ In the Goods of	39 L. J. P. 55.....	540, 557
“ v. Northern R. W. Co.	25 C. P. 301.....	49, 52, 54, 58, 62
“ Doe, v. Todd.....	2 U. C. R. 82	166
Anglo-Italian Bank v. Davies	9 Ch. D. 290.....	367
Angerstein, Ex parte.....	L. R. 9 Ch. 479	410
Antelope, The.....	10 Wheat. 123.....	Appendix V.
Armstrong v. Turquand	9. Ir. C. L. 32	194, 196
Arscott v. Lilley.....	14 A. R. 283	175, 181, 182
Ashby v. Jenner	32 Sol. J. 576.....	99, 102
Atkinson, In the Goods of	8 P. D. 165	542
Attorney-General v. Briant.....	15 M. & W. 169.....	268, 271
“ of Canada v. City of Toronto.....	18 A. R. 622	390, 395
Attorney-General v. Mayor of Rye	7 Taunt. 549	162
Attrill v. Huntington	70 Md. 191; 146 U. S. 657.....	Appendix X.
Ayerst v. Jenkins	L. R. 16 Eq. 275. .210, 213, 217, 219, 220	

B.

Bagot v. Arnott	Ir. R. 2 C. L. 1	205, 212
“ v. Easton	11 C. D. 392	105
Bailey v. Griffith.....	40 U. C. R. 418.....	301
Baker, Doe, v. Clark.....	7 U. C. R. 44	547
Baldwin v. Kingstone	18 A. R. 63.....	45
Bank of England v. Vagliano	[1891] A. C. 107	460
Bannan v. City of Toronto	22 O. R. 274	437
Barbier v. Connolly	113 U. S. 27.....	439
Barclay and Darlington, Re.....	12 U. C. R. 86	376
Barfoot v. Goodall	3 Camp. 147.....	668
Barker v. Cox	4 Ch. D. 464	292
“ v. Palmer	8 Q. B. D. 9	585, 590, 595

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Bartholomew v. Wiseman	8 Times L. R. 147.....	635, 642
Basevi v. Serra	14 Ves. 313	40
Bateman v. Thompson	Jenkins & Raymond's Duty of Arch- itects	92
Bateson v. Gosling	L. R. 7 C. P. 9	303
Batthyany v. Walford	33 Ch. D. 624	650
Baylor, Doe dem., v. Neff.	3 McLean 302	427
Beckett v. Grand Trunk R. W. Co.	16 S. C. R. 713	249
Beckford v. Kemble	1 S. & S. 7	648
Begbie v. Phosphate Sewage Co.	L. R. 10 Q. B. 499	222
Bell v. Lamont	7 P. R. 307	587
Belt v. Lawes	51 L. J. Q. B. 359	510
Bennett v. Grand Trunk R. W. Co.	3 O. R. 446	247, 252
Benson v. Whittam	5 Sim. 22	40
Bent v. Young	9 Sim. 180	648
Betta v. Williamsburgh	15 Barb. 255	21, 27
Bickle v. Beatty	17 U. C. R. 465	274
Bidder v. Bridges	37 Ch. D. 406	419
Biddulph, Doe, v. Hole	15 Q. B. 848	547
Bigelow v. State Mutual Life Assurance Association	123 Mass. 113	188
Bilbee v. London and Brighton R. W. Co.	18 C. B. N. S. 584	249
Birkett v. McGuire	7 A. R. 53, Cassels's Dig. 595, 19 C. L. J. 275	699
Blake v. Midland R. W. Co.	18 Q. B. 93	446, 451, 453, 459
" v. Pilfold	1 M. & Rob. 198	269
Bland v. Davison	21 Beav. 312	424
Bliss v. Collins	4 Madd. 229; 5 B. & Ald. 876	274
Bloxam v. Sanders	4 B. & C. 941	680
Blyth v. Birmingham Waterworks Co.	11 Exch. 784	629
Bodine v. Exchange Fire Insurance Co.	51 N. Y. 117	319
Boice v. O'Loane	3 A. R. 167	412, 413, 414
Bolling v. Teel	76 Va. 487	431
Bond v. Evans	21 Q. B. D. 249	520, 523
Bone v. Eckless	5 H. & N. 925	213
Bonisteel v. Saylor	17 A. R. 505	210
Bosley v. Davies	1 Q. B. D. 84	517
Bosworth v. Hearne	2 Str. 1085	440
Bouton v. America Mutual Life Insurance Co.	25 Conn. 542	319
Bowry v. Bennett	1 Camp. 348	203, 207, 212
Boyd v. Johnston	19 O. R. 598	72, 100
" v. Wabash, etc., R. W. Co.	16 S. W. R. 909	247
Brace v. Ormond	2 J. & W. 435	40
Bradshaw v. Lancashire and Yorkshire R. W. Co.	L. R. 10 C. P. 189	446
Brewer v. Harris	5 Gratt. 285	332
Briscoe's Trusts, re	26 L. T. N. S. 149	162
British Waggon Co. v. Lea & Co.	5 Q. B. D. 149	603
Broad v. Perkins	4 Times L. R. 775	382
Bronson and Ottawa, In re	1 O. R. 415	117
Brook v. Avrillon	21 W. R. 594	186
Brown v. Bowen	30 N. Y. 519	317
" v. Brown	8 E. & B. 886	559
" v. Foot	17 Cox C. C. 509	520, 523
Brown, Lessee of, v. Galloway	1 Peters (C. C.) 291	431
" v. Shaw	1 A. R. 293	419
" v. Storey	1 Scott N. R. 9	343
Brunsdon v. Humphrey	14 Q. B. D. 141	446

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Buchanan v. Galt	12 C. P. 73.....	114
Buckland v. Gibbins.....	32 L. J. Ch. 391.....	433
Butcher v. Stead	L. R. 7 H. L. 839	473
Butler v. Manchester, etc., R. W. Co.	21 Q. B. D. 207.....	477, 478, 480, 485
Burlington, etc., R. W. Co. v. Rose.....	1 Am. & Eng. R. W. Cas. 253.....	478
Burrow v. Scammell	19 Ch. D. 175.....	292
Burrowes, In re	18 C. P. 493	585, 588, 594
Bussian v. Milwaukee, etc., R. W. Co.	10 A. M. & Eng. Ry. Cas. 716	257
Byne, Doe dem., v. Brewer.....	4 M. & S. 300	427
Byrne v. Boadle	2 H. & C. 722	629

C.

Cameron v. Milloy.....	14 C. P. 340	63
Campbell v. Barrie	31 U. C. R. 279.....	465, 467, 468, 474
“ v. Robinson	27 Gr. 634	72, 99
Canada Southern R. W. Co. and Norvall, In re	41 U. C. R. 195.....	18
Canadian Pacific R. W. Co. v. Robinson.....	19 S. C. R. 292; [1892] A. C. 481	459, 462
Cann v. Knott.....	19 O. R. 422	213
Cannan v. Bryce.....	3 B. & Ald. 179	204, 205, 206
Carpenter and Township of Barton, In re ..	15 O. R. 55.....	531
Carr v. London and North-Western R. W. Co.	L. R. 10 C. P. 307	671
Carrington v. Cornock	2 Sim. 567.....	447, 450
Carty v. City of London	18 O. R. 122.....	60
Casey v. Canadian Pacific R. W. Co.	15 O. R. 574.....	247, 252
Cassels v. Stewart	6 App. Cas. 63.....	292
Castellain v. Preston	11 Q. B. D. 380	606, 608
Castle v. Wilkinson	L. R. 5 Ch. 534	292
Catesby's Case.....	6 Rep. 377.....	331
Caulfield v. Whitworth	16 W. R. 936, 18 L. T. N. S. 527..	185
Cecil v. Butcher.....	2 Jac. & W. 565	218
Central Bank of Canada v. Garland	20 O. R. 142, 18 A. R. 438	697
Chamley v. Lord Dunsany	2 Sch. & Lef. at p. 718	104
Chapman, In the Goods of	1 Robertson 1	542
Chessman v. Whittemore.....	23 Pick. 231	216
Child v. Mann.....	L. R. 3 Eq. 806.....	357, 363
Chisholm v. Doulton	22 Q. B. D. 736.....	517, 524
City Bank v. Barrow	5 App. Cas. 664	414
City of London v. Perkins	3 Bro. P. C. 602	450, 454
Citizens Insurance Co. v. Parsons	7 App. Cas. 110	502
Clark v. Devlin	3 B. & P. 363	301
Clarke v. Watson	18 C. B. N. S. 278.....	92
Clarkson v. Ontario Bank.....	15 A. R. 166.....	490, 493, 499
“ v. Severs	17 O. R. 592	491
“ Sterling	15 A. R. 234	466, 467
Coburn v. Great Northern R. W. Co.	8 Times L. R. 31.....	249
Cocks, Ex parte	21 Ch. D. 397	603
Cole v. Porteous	19 A. R. 111.....	464, 467, 465, 471, 475
Coleman, In re, Henry v. Strong	39 Ch. D. 443	37
Coldwell v. Holme	2 Sm. & G. 31	162
Collingridge v. Royal Exchange Assur- ance Corporation.....	3 Q. B. D. 173.....	608
Collins v. Blantern.....	1 Sm. L. C. 9th ed. 398.....	211
Columbus Insurance Co. v. Peoria Bridge Association	6 McLean (C.C.) 70	287

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Colquhoun and Berlin, In re.	44 U. C. R. 631.....	18
Compagnie d'Assurance v. Grammon...	24 L. C. Jur. 82.....	319
Companhia de Mocambique v. British South Africa Co.	[1892] 2 Q. B. 358	181, 648, 650
Connec v. Canadian Pacific R. W. Co. .	16 O. R. 639	90
Connor v. Belfast Commissioners	5 Ir. Rep. C. L. 55.....	92
Connecticut Fire Ins. Co. v. Kavanagh...	8 Times L. R. 752	243
Continental Improvement Co. v. Stead. .	95 U. S. 160.....	248, 252
Cook v. Johnston	58 Mich. 437	58
Cookney v. Anderson	31 Beav. 452	648
Corby v. Gray	15 O. R. 1	99, 103
Cornwallis, Municipality of v. Canadian Pacific R. W. Co.	19 S. C. R. 702	388, 390, 392
Costellain v. Preston	11 Q. B. D. 380	606, 608
Cottrill v. Chicago, etc., R. W. Co.	47 Wis. 734	52, 58
Cowan v. O'Connor	20 Q. B. D. 640.....	380
Cowley v. Newmarket Local Board	8 Times L. R. 788	242
Cowper v. Smith	4 M. & W. 519	301
Cox v. Burbidge	13 C. B. N. S. 430	59
" v. Great Western R. W. Co.	9 Q. B. D. 106.....	249
Coyle v. Great Northern R. W. Co.	20 L. R. Ir. 409	248
Crawford v. Beattie	39 U. C. R. 13	635
Crawshaw v. Thornton	2 M. & Cr. 1.....	357, 363
Credit Valley R. W. Co. and Spragge, In re	24 Gr. 231	18, 31
Crisp v. Churchill	Cited in 1 B. & P. 340	207
Crockett v. Crockett	1 Ha. 461; 5 Ha. 326; 2 Ph. 553. .	39
Croft v. Lumley	6 H. L. C. 672	195
Cross v. Ottawa	23 U. C. R. 288	534
" v. Plymouth	125 Mass. 557	21
Crowhurst v. Amersham Burial Board. .	6 Exch. D. 5	59
Cumber v. Wane	1 Str. 426	414, 420
Cunningham v. Almonte, In re.	21 C. P. 459	393
Curtin v. Great Southern and Western R. W. Co.	22 L. R. Ir. 219	248
Curtis v. Sheffield.....	20 Ch. D. 398	423, 424
Cutto v. Gilbert	9 Moo. P. C. 131.....	559

D.

Darrell v. Tibbitts	5 Q. B. D. 560.....	606
Dartmouth, Lady, v. Roberts.....	16 East 334.....	450
Davenport v. The Queen	3 App. Cas. 115	314
Davey v. London and South Western R. W. Co.	11 Q. B. D. 213; 12 Q. B. D. 70, 247, 248, 253	
Davidson v. Ross	24 Gr. 22	465, 467, 468, 474
Davis v. Canadian Pacific R. W. Co.	12 A. R. 724	583
" v. Eyton	7 Bing. 154	275
" v. Memphis and Charleston R. W. Co.	39 Am. & Eng. R. W. Cas. 65....	149
Davis v. Shepstone	11 App. Cas. 187	510
Day v. Day	17 A. R. 157	210, 212
" v. McLea	22 Q. B. D. 610.....	412, 418, 420
Dennis, In the Goods of	[1891] P. 328	540
Dickinson v. Valpy	10 B. & C. 128	671
Diggles, In re, Gregory v. Edmondson ..	39 Ch. D. 253	38, 39
Donahoe v. Wabash, etc. R. W. Co.	53 Am. R. 594.....	52, 58

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Donovan v. Springfield	125 Mass. 371	21
Downs v. New York, etc., R. W. Co.	36 Conn. 287	478
Duke v. Great Western R. W. Co.	14 U. C. R. 369	477, 480, 482
Duncan v. Findlater	6 Cl. & F. 894	236
Duncan, Fox & Co. v. North and South Wales Bank	6 App. Cas. 11	72
Duncan v. Lawson	5 Times L. R. 402; 41 Ch. D. 394	581
Dunlop v. Township of York	16 Gr. 216	402
Dunn v. Allen	1 Vern. 283	423
Dutton (or Dalton) v. Furness	35 Beav. 46; 12 Jur. N. S. 386	357
Dyment v. Thompson	12 A. R. 659; 13 S. C. R. 304	676
Dyke, In the Goods of	6 P. D. 207	542, 557
Dyson v. London & North-Western R. W. Co.	7 Q. B. D. 32	482

E.

Eagle v. Charing Cross R. W. Co.	L. R. 2. C. P. 638	18, 27
Earle's Trust, In re	4 K. & J. 673	541
Eccles, In re	6 U. C. L. J. 59	339, 345, 358
Eckert v. Long Island R. W. Co.	43 N. Y. 502	52, 58, 61
Ecclesiastiques de St. Sulpice, Les, v. Montreal	16 S. C. R. 399	390
Edgar v. Central Bank	15 A. R. 196	494, 496, 499, 501
" v. Northern R. W. Co	11 A. R. 452	63
Edge v. Duke	18 L. J. Ch. 183	195, 330
Egremont, Doe dem., v. Stephens	2 D. & L. 993	427
Ellis v. London and South Western R. W. Co.	2 H. & N. 424	579, 582
Ellis v. Watt	8 C. B. 614	595
" v. Loftus Iron Co	L. R. 10 C. P. 10	632
Emmanuel, Ex parte	17 Ch. D. 35	602
England, In re	L. R. 12 Eq. 207	358
" Bank of, v. Vogliano	[1891] A. C. 107	460
Evans v. Field	8 L. J. Ch. 264	562
Ewing v. Orr-Ewing	9 App. Cas. 34	649
Eyre v. Brett	34 Beav. 441	424

F.

Faikney v. Reynous	4 Burr. 2069	213
Farmer v. Russell	1 B. & P. 296	213
Farr v. Hennis	44 L. T. N. S. 202	40
Fearn's Will, In re	27 W. R. 392	162
Fee v. McIlhargy	9 P. R. 329	581, 591, 595
Fenn v. Stille	1 Yeates 154	429
Fenwick v. Laycock	2 Q. B. 108	352
Feret v. Hill	15 C. B. 207	205, 213
Ferrao's Case	L. R. 9 Ch. 355	410
Firth v. Bowling Iron Co	3 C. P. D. 254	62
Fisher v. Bridges	3 E. & B. 642	211
Fivaz v. Nicholls	2 C. B. 501	213
Flash v. Conn	109 U. S. 371	Appendix IX.
Fleming v. City of Toronto	19 A. R. 318	531
Fletcher v. Lord Sondes	3 Bing. 501	218
Flinn v. Perkins	32 L. J. Q. B. 10	687
Foakes v. Beer	9 App. Cas. 605	414
Folliott v. Ogden	1 H. Bl. 123	Appendix V.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Fraser v. Province of Brescia Steam Tramways Co	56 L. T. N. S. 771	410
Freeman v. Arkell	1 C. & P. 137	269
Frontenac Loan and Investment Society v. Hysop	21 O. R. 577	99
Fulton v. Grand Trunk R. W. Co.	17 U. C. R. 428	483, 477, 478

G.

Gahagan v. Boston, etc., R. W. Co	1 Allen 187	249
Garnett v. Bradley	3 App Cas 944	181
Garrett v. Messenger	L. R. 2 C. P. 583	640
Geere v. Mare	2 H. & C. 339	211
Genet v. City of Brooklyn	99 N. Y. 296	18
Gibbins v. Buckland	1 H. & C. 736	428, 433
Glass, Ex parte	3 P. R. 138	339, 345
Goit v. National Protection Ins. Co.	25 Barb. 189	189
Goodman v. Taylor.	5 C. & P. 410	630
Goodwin v. Cheveley	4 H. & N. 631	631
Goodyear v. Mayor of Weymouth	Har. & Ruth. 67, 35 L. J. C. P. 12.	92
Gordon, In the Goods of	[1892] P. 228	339, 345
Gottwalls v. Mulholland	15 C. P. 73	491
Gourlay v. Ingram	2 Ch. Ch. 238	357
Grand Trunk R. W. Co. v. Ives	144 U. S. 408	61
Great Western R. W. Co. v. Baby	12 U. C. R. 106	18, 21, 30
Green v. Hassel	Sayer's Reports 233	346
“ v. Orford	16 A. R. 4	88, 93
“ v. Wynn	L. R. 4 Ch. 204	301, 303
Griffiths v. Earl of Dudley	9 Q. B. D. 357	447, 451, 456, 459
Gross v. Fowler	21 Cal. 393	332
Grubb, Doe dem., v. Grubb	5 B. & C. 457	423
Gunmakers of the City of London v. Fell.	Willes 388.	442

H.

Haigh v. Kaye	L. R. 7 Ch. 469	210, 212
Hale v. Saloon Omnibus Co.	4 Drew. 492	357
“ v. Tokelove	2 Robertson 318	542
Hamilton Provident and Loan Society v. Cornell	4 O. R. 623	687
“ v. Walker	[1892] 2 Q. B. 25.	635, 636, 638, 639, 643
Harding v. Board of Land and Works ..	11 App. Cas. 208	21
Hare v. Proudfoot	6 O. S. 617	274
Hasker v. Wood	54 L. J. Q. B. 419	181
Harris v. Mobbs	3 Exch. D. 268	62
“ v. Mulkern	1 Exch. D. 31	431
Harrison v. Ridley	Comyn. 589	423
Hart v. Middleton	2 C. & K. 9	315, 319, 331
Harty v. Appleby	19 Gr. 205	400
Harvey, Ex parte	4 D. M. & G. 884	301, 303
Hawthorne, In re, Graham v. Massey ..	23 Ch. D. 743	650
Hay v. Great Western R. W. Co	37 U. C. R. 456	54, 59
Hayman, Ex parte	8 Ch. D. 11	665
Hazeldine v. Grove	3 Q. B. 997	343
Head, In re, Head v. Head	[1893] 3 Ch. 426	695
Hebblethwaite v. Peever	[1892] 1 Q. B. 124	414
Heilbutt v. Hickson	L. R. 7 C. P. 438	676
Henderson v. Stevenson	L. R. 2 Sc. Ap. 470	478

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Hennessey v. Wright	21 Q. B. D. 509	268
Herman v. Jeuchner	15 Q. B. D. 561	210, 211, 222
Herrick v. Malin	22 Wend. 388.....	216
Hindlip, Lord, v. Mudford	6 Times L. R. 367.	510, 512
Hire Purchase Furnishing Co. v. Richens.	20 Q. B. D. 387.....	603
Hobbs, In re, Hobbs v. Wade.....	36 Ch. D. 553	45, 46
" v. London & S. W. R. W. Co ..	L. R. 10 Q. B. 111.....	59
Hodgson and Bosanquet, In re.	11 O. R. 589	21
" v. Temple	5 Taunt. 181	203
Hoit v. Stratton Mills	54 N. H. 109	606
Holman v. Johnson	1 Cowp. 343.....	210
Holmes v. Mather	L. R. 10 Exch. 261.	631
" v. Millage	9 Times L. R. 217, 331; [1893] 1	
" v. Murray	Q. B. 551	367, 371
Hooper v. Smart	13 O. R. 756.....535, 541, 542, 547, 557	
Hoover v. Craig	L. R. 18 Eq. 683	292
Hoover v. Craig	12 A. R. 72.....	176, 177, 178
Hopkins, Daisy, Ex parte.	17 Cox C. C. 444	644
Hopwood v. Hopwood	7 H. L. C. 728	542, 547
Horton v. Provincial Provident Institu- tion	16 O. R. 382; 17 O. R. 361	319
Horrocks v. Rigby.....	9 Ch. D. 180	292
Howard v. Ingersoll.....	13 How. 381	4, 9
Howorth v. Dewell	29 Beav. 18	38
Hulin v. Powell	3 C. & K. 323	449
Hutchinson and Tennant, In re	8 Ch. D. 540	39, 42
Hutton v. Brown.....	45 L. T. N. S. 343	331

I.

Illidge v. Goodwin.....	5 C. & P. 190	630
Illinois Central Co. v. Wolf.....	37 Ill. 354	319, 330
Incorporated Society v. Richards	1 Dr. & W. 258	162
Inderwick, In re	25 Ch. D. 279	338, 345
Indianapolis, etc., R. W. Co. v. Stout ..	53 Ind. 143	447, 449
Insurance Co. v. French	30 Ohio St. 240	319
Insurance Co. v. Wolf	95 U. S. 326	330

J.

Jackson v. Barry R. W. Co.....	9 Times L. R. 90	93, 94
" dem. Henderson v. Davenport..	18 Johns. 295	428
James v. Ontario & Quebec R. W. Co ..	12 O. R. 624, 15 A. R. 1. 18, 21, 25, 27	
Jay v. Johnstone	[1893] 1 Q. B. 25, 189.....	412, 414
Jeffersonville, etc., R. W. Co. v. Esterle.	14 Bush. 667	32
Jennings v. Great Northern R. W. Co ..	L. R. 1 Q. B. 7	480
" v. Throgmorton	Ry. & Moo. 251	208, 211
Jenner v. Finch.....	5 P. D. 106	542
Johnson v. Cline.....	16 O. R. 129	210
Johnston v. Shortreed	12 O. R. 633	606
Jones, In re	L. R. 13 Eq. 336	337, 345
" v. Boyce	1 Starkie 493	60
" Co., The D. A., In re	19 A. R. 63.....	601
" v. Gittins.....	51 L. T. N. S. 599.....	585, 590, 595
" v. Grand Trunk R. W. Co.....	16 A. R. 37.....	248
" v. Kearney	1 Dr. & W. 155	81
" v. Merionethshire, etc., Building Society	[1892] 1 Ch. 173	212
Joyner v. Weeks	[1891] 2 Q. B. 31.....	607, 609
Jubber v. Jubber	9 Sim. 503.....	37, 39

K.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Kate Moffatt, The, In re	14 C. L. J. 284	424
Kearley v. Thomson	24 Q. B. D. 742	210, 211, 222
Kelly v. O'Malley	6 Times L. R. 62	512
Kemp v. Rose	1 Giff. 258	90, 95
Kennedy v. Brown	13 C. B. N. S. 677	343
Keppel v. Bayley	2 M. & K. 517	279
Kiely, Re.	13 O. R. 451	438, 439, 441
Kilvert's Trusts, In re	L. R. 7 Ch. 170	162
Kimberley v. Dick	L. R. 13 Eq. 1	89, 90, 91, 94
Kingston & Pembroke R. W. Co. v. Murphy	17 S. C. R. 582	116
Kinnersley v. Orpe	2 Doug. 517	450
Kirk v. Todd	21 Ch. D. 484	637
Klein v. Insurance Co.	104 U. S. 88	188
Knickerbocker Life Insurance Co. v. Pendleton	112 U. S. 696	188, 314, 317, 571
Knight's Case	5 Rep. 55 (b)	278
Knight v. Clarke	15 Q. B. D. 294	423, 428, 433
Knowles v. Holden	24 L. J. Exch. 223	383

L.

Lady Dartmouth v. Roberts	16 East. 334	450
Laidlaw v. Hastings Pier Co.	Jenkins & Raymond, Appendix ..	92
Lambe v. Eames	L. R. 6 Ch. 597	39, 41
Lang v. Gale	1 M. & S. 111	331
Langlois v. Baby	10 Gr. 358; 11 Gr. 21	210
Langton v. Hughes	1 M. & S. 593	203, 204, 211
Lapthorne v. St. Aubyn	1 C. & E. 486	92
Lartz v. Vermont Life Ins. Co.	139 Pa. St. 546	194, 316
Laurie v. Crush	32 Beav. 117	424
Law Courts Chambers Co., In re.	61 L. T. N. S. 669	99
Lawrence v. Maule	4 Drew. 472	447
Lawson v. Waulsey Local Board.	48 L. T. N. S. 507; 11 Q. B. D. 229.	89, 90, 94
Lee v. Birrell	3 Camp. 337	269
" v. Butler	[1893] 2 Q. B. 318	659
" v. Riley	18 C. B. N. S. 722	59
Legacy v. Pitcher	10 O. R. 620	175, 176, 181, 182
Leggott v. Great Northern R. W. Co. ...	1 Q. B. D. 599	446, 447
Lemon and Peterson, In re	8 U. C. L. J. 185	339, 345, 346
Lessee of Brown v. Galloway	1 Peters (C. C.) 291	431
Lett v. St. Lawrence & Ottawa R. W. Co.	1 O. R. 545	249
Lewin v. Wilson	11 App. Cas. 639; 9 S. C. R. at 652 ..	72, 74, 77, 79, 80, 83, 84
Liming v. Illinois Central R. W. Co.	47 N. W. R. 66	52, 60
Lincoln Paper Mills Co. v. St. Catharines & Niagara Central R. W. Co.	19 O. R. 106	400
Linnahan v. Sampson	128 Mass. 506	52, 58
Linton v. Imperial Hotel Co.	16 A. R. 337	275, 280
Livingston v. Mayor of New York	8 Wend. 85, 102	21
Llanover v. Homfray	19 Ch. D. 224	447, 450, 458
Lloyd v. Johnson	1 B. & P. 340	207
Lockie v. Tennant	5 O. R. 52	96, 99, 104
London, City of, v. Perkins	3 Bro. P. C. 602	450, 454
" Mayor of, v. Cox	L. R. 2 H. L. 239	380, 585, 591, 594

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Long Point Co. v. Anderson, In re	18 A. R. 401	339, 345, 346
Lowes v. Lowes	1 W. R. 14	423
Ludwig v. Iglehart	43 Md. 39	303
Lynch v. Nurdin	1 Q. B. 29	630

M.

Mackett v. Mackett	L. R. 14 Eq. 49	40
Mackie v. European Assurance Society ..	21 L. T. N. S. 102	196
Major v. Williams	3 Curt. 432	559
Manitoba Free Press v. Martin	21 S. C. R. 518	515
Manufacturers' Life Insurance Co. v. Gordon	20 A. R. 309	564, 569, 570, 575
Mapleback, In re	4 Ch. D. 150	210
Marks v. Beyfus	25 Q. B. D. 494	268, 270, 271
Marnier v. Bright	11 Ch. D. 392	105
Marsh v. Marsh	1 Sw. & T. 533	544
Martinsburgh R. W. Co. v. March	114 U. S. 549	92
Martyn v. Gray	14 C. B. N. S. 824	670
Massé v. Hochelaga Mutual Ins. Co.	22 L. C. Jur. 124	189
Maxim Nordenfeldt Guns and Ammunition Co. v. Nordenfeldt	9 Times L. R. 150; [1893] 1 Ch. 630	440
Meacham v. Fitchburg R. W. Co	4 Cush. 291	21
Merchants' Bank v. Bliss	35 N. Y. 412	Appendix IX.
Merivale v. Carson	20 Q. B. D. 275	510
Methuen v. Methuen	2 Phillimore 416	543
Merritt, In the Goods of	1 Sw. & T. 112	543
Middlesex, Sheriff of, Ex parte, In re England	L. R. 12 Eq. 207	358
Miller v. Life Insurance Co	12 Wall. 285	189
Mills Estate, In re	34 Ch. D. 24	181
Mirama, Re	[1891] 1 Q. B. 594	369
Mitchell v. Reynolds	1 P. Wms. 181	441, 442
" v. Mulholland	14 C. L. J. 55	587
" v. Scribner, In re	20 O. R. 17	595
Moffatt v. Reliance Mutual Assurance Society	45 U. C. R. 561	191
Moggridge v. Hall	13 Ch. D. 380	447
Molson's Bank v. Halter	18 S. C. R. 88	472, 473
Montefiori v. Montefiori	1 W. BL 363	222
Montreal, Bank of v. Bower	18 O. R. 226	36, 38
Moody v. Pacific, etc., R. W. Co.	68 Mo. 470	247
Moorehouse v. Bostwick	11 A. R. 76	406, 407, 408, 410
Morgan, Doe dem., v. Bluck	3 Camp. 447	428, 433
" v. Couchman	14 C. B. 100	343
" v. Hardy	17 Q. B. D. 770	609
" v. Nicholl	L. R. 2 C. P. 117	448, 449
" v. Scarfe	4 M. & W. 270	221
Mortlock v. Buller	10 Ves. 314	292
Morton and St. Thomas, Re	6 A. R. 323	376
Muir v. Crawford	L. R. 2 Sc. App. 456	301, 303, 304
Mullins v. Collins	L. R. 9 Q. B. 292	523
Mundell v. Tinkis	6 O. R. 625	210
Municipality of Cornwallis v. Canadian Pacific R. W. Co.	19 S. C. R. 702	388, 390, 392
Murray v. Garretson	4 Serg. & R. 130	429
" v. Lord Elibank	1 W. & T. L. C., 6th ed., 501	43

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Mussoorie Bank v. Raynor	7 App. Cas. 321	39, 42
Mutual Benefit Life Ins. Co. v. French..	4 Big. Ins. Cas. 369; 30 Ohio St. 240.	566, 570, 571

Mo.

McCrea v. Waterloo County Mutual Fire Ins. Co.	1 A. R. 218	189
McDonnell v. Carr	Hayes & Jones 256	325, 328
McFadzen v. Mayor of Liverpool	L. R. 3 Exch. 279	269
McGeachie v. North America Life Assurance Co.	20 O. R. 151; 20 A. R. 187 ..	309, 317, 328, 564, 565, 569, 570, 575
McHardy v. Ellice	1 A. R. 628	3, 6
McIntosh v. Great Western R. W. Co..	2 DeG. & Sm. 758	92
McIntyre v. East Williams Mutual Fire Ins. Co.	18 O. R. 79	189
McKelvin v. City of London	22 O. R. 70	59
McKinnell v. Robinson	3 M. & W. 434	204, 211
McKnight v. City of Toronto	3 O. R. 284	438
McLean v. McLeod, In re	5 P. R. 467	585, 587, 595
McLeod v. McNab	[1891] A. C. 471 ..	540, 542, 543, 546, 554, 556
McMahon v. Field	7 Q. B. D. 591	59, 62
“ v. Spencer	13 A. R. 430	414, 419
McMaster v. Newmarket	11 C. P. 398	532, 534
McMichael v. Grand Trunk R. W. Co..	12 O. R. 547	577, 578, 581, 582, 583
“ v. Wilkie	18 A. R. 464	99
McPherson v. McPhee, In re	21 O. R. 280, 411	585, 595
McRoberts v. Steinoff	11 O. R. 369	466

N.

Nash, Doe, v. Birch	1 M. & W. 402 ..	195
Neald v. Corkindale	4 O. R. 317 ..	104
Neill v. Union Mutual Life Insurance Co.	45 U. C. R. 593; 7 A. B. 171..	188, 195, 317
Newbould v. Smith	33 Ch. D. 127; 14 App. Cas. 423..	78
Newill v. Newill	L. R. 7 Ch. 253	39
Newman, In re	30 Beav. 196	345
Newton v. Newton	12 Ir. Ch. 118	542
Noble v. Cling, Re	18 O. R. 33	380
Norris v. Chambres	29 Beav. 246; 3 D. F. & J. 583 ..	648
Nudell v. Williams	15 C. P. 348	315, 319
Nunes v. Carter	L. R. 1 P. C. 342	467

O.

O'Brien v. Lewis	32 L. J. Ch. 569	345
O'Donohoe, In re	4 P. R. 266	339, 345
Ogden v. Folliott	3 T. R. 734	Appendix V.
Olmstead v. Farmers' Mutual Fire Insurance Co.	50 Mich. 200	193
Onley v. Gee	30 L. J. M. C. 222; 7 Jur. N. S. 570; 4 L. T. N. S. 338; 9 W. R. 662	635, 637, 639, 640, 642
Ontario and Quebec R. W. Co., and Taylor, In re	6 O. R. 338	18, 21, 31

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Osborne, In re.....	25 Beav. 353	345
" v. Usher.....	6 Bro. P. C. 20	423
Ottawa, Bank of, v. Wade, In re.....	21 O. R. 486	585, 586

P.

Pacaud v. Roy	15 L. C. Reports 205	636
Page v. Bucksport	64 Me. 51	59
Paget v. Ede	L. R. 18 Eq. 118	650
Palmer Co. v. Ferrill	17 Pick. 58	21, 28, 32
Parkdale v. West	12 App. Cas. 602	117, 119
Parker v. Webb	3 Salk. 5.	274, 275
Patterson v. McLean	21 O. R. 221	99
Pawley v. Turnbull	3 Giff. 70	90
Pawson v. Brown	13 Ch. D. 202.....	218
Pearce v. Brooks.....	L. R. 1 Exch. 213.....	204, 206, 211
Pearse v. Coaker	L. R. 4 Exch. 92.....	431
Peart v. Grand Trunk R. W. Co.....	10 A. R. 191	249
Pellecat v. Angell	2 C. M. & R. 311	212
Penn v. Lord Baltimore	2 W. & T. L. C. 6th ed. 1047..	648, 649
Pennsylvania R. W. Co. v. Beale.	73 Pa. St. 504	248
Perkins v. Bell	[1893] 1 Q. B. 193.....	676, 680
Petrie v. Keeble	3 T. R. 418	213
Phillips v. Martin	15 App. Cas. 193	510
Pike v. Grand Trunk R. W. Co.	39 Fed. Rep. 255	61
Pince v. Beattie	32 L. J. Ch. 734.....	345
Pitt v. Berkshire Life Insurance Co.	100 Mass. 500	188, 317
Pitts v. La Fontaine	6 App. Cas. 482.....	410
Plumb v. McGannon.....	32 U. C. R. 8	3
Poget v. Ede	L. R. 18 Eq. 118.....	650
Pordage v. Cole	1 Wms. Saunders 551	572
Potter v. Metropolitan R. W. Co.	30 L. T. N. S. 765; 32 L. T. N. S. 36.	446
Potta, Re	9 Times L. R. 308.....	371
" v. Dunville	38 U. C. R. 96	532, 534
Pratt v. Stratford	16 A. R. 5.....	114, 117
Pritchard v. Merchants, etc., Life Assurance Society.....	3 C. B. N. S. 622... 318, 322, 323,	325, 327, 332
Pulling v. Great Eastern R. W. Co.....	9 Q. B. D. 110.....	684
Pym v. Great Northern R. W. Co.	2 B. & S. 759; 4 B. & S. 396..	446, 451, 452, 459, 510

Q.

Quirt v. The Queen	19 S. C. R. 510.....	494, 496, 500
--------------------------	----------------------	---------------

R.

Radley v. London and North Western R. W. Co.	1 App. Cas. 754.....	247, 285
Raikes v. Ward.....	1 Ha. 445	39
Railroad Co. v. Houston	95 U. S. 697	248
Ranger v. Great Western R. W. Co.....	5 H. L. C. 72	92
Rawlings v. Morgan	18 C. B. N. S. 776	609
Rayner v. Preston	18 Ch. D. 1	606
Read v. Great Eastern R. W. Co.	9 B. & S. 714; L. R. 3 Q. B. 555..	447, 451, 455, 459
Reedie v. London and North Western R. W. Co.	4 Exch. 244	236

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Reeve v. Bird.....	1 C. M. & R. 31.....	343
“ v. Gibson.....	[1891] 1 Q. B. 652.....	181
“ v. Thompson.....	14 O. R. 499.....	274
Regina v. Bernard.....	4 O. R. 603.....	635
“ v. County of Wellington.....	17 A. R. 421.....	494, 500
“ v. Chandler.....	2 Cart. 421.....	496
“ v. Clarke.....	20 O. R. 642.....	635
“ v. Doty.....	18 U. C. R. 398.....	587
“ v. French.....	13 O. R. 80.....	636
“ v. Gibson.....	18 Q. B. D. 537.....	643
“ v. Hartley.....	20 O. R. 481.....	633, 640, 644
“ v. Heffernan.....	13 O. R. 616.....	636, 640
“ v. Johnston.....	38 U. C. R. 549.....	438
“ v. Justices of Carrick-on-Suir.....	16 Cox. C. C. 571.....	636, 640, 644
“ v. Lancaster, etc., R. W. Co.....	6 Q. B. 759.....	127
“ v. Perth.....	14 U. C. R. 156.....	114
“ v. Pipe.....	1 O. R. 43.....	437
“ v. Richardson.....	3 F. & F. 693.....	268, 270
“ v. Roe.....	16 O. R. 1.....	635
“ v. Shaw.....	10 Cox C. C. 66.....	644
“ v. Sloan.....	18 A. R. 482.....	522
“ v. Smith.....	46 U. C. R. 442.....	633, 644
“ v. Stephens.....	L. R. 1 Q. B. 702.....	517
“ v. White.....	21 C. P. 354.....	637
“ v. Williams.....	42 U. C. R. 462.....	520
Rex v. Hardy.....	24 How. St. Tr. at col. 811.....	268
“ v. Harrison.....	3 Burr. 1322.....	439
“ v. Inhabitants of Oxfordshire.....	1 B. & Ad. 289.....	3
“ v. Swallow.....	8 T. R. 284.....	641
“ v. Trafford.....	1 B. & Ad. 874.....	3
“ v. Watson.....	32 How. St. Tr. at col. 100.....	268
Rexter v. Starin.....	73 N. Y. 601.....	52, 58, 61
Reynolds, In the Goods of.....	L. R. 3 P. & D. 35.....	541, 557
Richards v. Gellatly.....	L. R. 7 C. P. 127.....	665
Richardson, In re.....	3 Ch. Ch. 144.....	337, 346
Rigby v. Hewitt.....	5 Exch. at p. 243.....	51
Riordan v. Willcox.....	4 Times L. R. 475.....	510
Rippon v. Norton.....	2 Beav. 63.....	37
Rivis v. Watson.....	5 M. & W. 255.....	274
Roach v. McLachlan.....	19 A. R. 496.....	690, 691, 693, 694
Robert v. New England Mutual Life Insurance Co.....	1 Disney (Ohio) 355; 2 Disney 106.....	194, 317
Roberts, Doe dem., v. Roberts.....	2 B. & Ald. 367.....	216
Roberts v. Roberts.....	Daniell 143.....	216
Roberts v. Commissioners.....	21 Kan. 247.....	27
Robertson's Trust, In re.....	6 W. R. 405.....	35, 38, 40, 41, 42
Robinson v. Campbell.....	3 Wheat. 211.....	427
Rock v. Cook.....	2 Ph. 691.....	357
Rodgers v. Richards.....	[1892] 1 Q. B. 555.....	635, 638, 639, 642
Rodrian v. New York, etc., R. W. Co.....	125 N. Y. 526.....	248
Roehner v. Knickerbocker Life Insurance Co.....	4 Daly 512; 63 N. Y. 160.....	194, 571
Rogers v. Goodenough.....	2 Sw. & T. 342.....	546
Rona, The.....	51 L. T. N. S. 32.....	52
Rouse v. Bradford Banking Co.....	[1893] W. N. 194.....	695
Rugan's Lessee v. Phillips.....	4 Yeates 382.....	429

S.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Salvin v. James	6 East. 571	324, 328
Saunders v. South-Eastern R. W. Co.	5 Q. B. D. 456	482
Saunderson v. Glass	2 Atk. 296	349
Scarfi v. Jardine	7 App. Cas. 345	308
Scarfe v. Morgan	4 M. & W. 270	216
Schofield v. Chicago, etc., R. W. Co.	114 U. S. 615	248
Scott v. Brown	[1892] 2 Q. B. 724	222
“ v. Corporation of Tilsonburg.	13 A. R. 233	372, 374, 376, 377, 378
“ v. Dublin, etc., R. W. Co.	11 Ir. C. L. 397	247
“ v. Peterborough	19 U. C. R. 469	534
Seale v. Gulf and Sante Fe R. W. Co.	65 Texas 274	58, 59
Senior v. Ward	1 E. & E. 385	459
Sexton v. North Bridgewater	116 Mass. 200	18
Seymour v. London, etc., Insurance Co.	41 L. J. C. P. 193	211
Sheets v. Selden's Lessee	2 Wall. 177	332
Shephard, In re, Atkins v. Shephard.	43 Ch. D. 131	36, 42
Sheriff of Middlesex, Ex parte.	L. R. 12 Eq. 207	358
Simpson v. Accidental Death Ins. Co.	2 C. B. N. S. 257	316, 318, 322, 323, 325, 332
“ v. Bloss	7 Tannt. 246	213
“ v. Margitson	11 Q. B. 23	315, 316, 319, 331
“ v. Robinson	12 Q. B. 511	185
Sims v. Kelly, Re	20 O. R. 291	349
Skinner v. Ogle	4 Notes of Cases, 74	541
Slater v. Canada Central R. W. Co.	25 Gr. 363	400
Slingsby v. Boulton	1 V. & B. 334	356, 363
Smith v. Benton	20 O. R. 344	205, 210, 211
“ v. City of London Ins. Co.	11 O. R. 38	319
“ v. Green	1 C. P. D. 92	59
“ v. Methodist Church	16 O. R. 199	156, 158, 162, 163, 172
“ v. White	L. R. 1 Eq. 626	208, 211
“ v. Winter	4 M. & W. 454	301
Somers et al., Doe, v. Bullen	5 U. C. R. 369	275
Soon Hing v. Crowley	113 U. S. 703	374, 377, 439
Stamford, etc., Banking Co. v. Smith	[1892] 1 Q. B. 765	74
Stead v. Mellor	5 Ch. D. 225	39
Steam Engine Co. v. Hubbard	101 U. S. 188	Appendix VIII.
Stedham, In the Goods of	6 P. D. 205	542, 557
Steele, In the Goods of	L. R. 1 P. & D. 575	540, 541, 543, 554, 556
Stephen v. McGillivray	18 A. R. 516	234
Stevens v. Copp	L. R. 2 Exch. 29	279
Steward v. Moore	9 C. L. J. 82	587
Stickney v. Maidstone	30 Vt. 738	61
Stillwell v. Mellersh	20 L. J. Ch. 356	542
Story, Ex parte	8 Exch. 195	595
Strange v. Radford	15 O. R. 145	648
Strong v. Birchard	5 Conn. 357	345
Stubble v. London & North Western R. W. Co.	L. R. 1 Exch. 13	248
Stader v. Buffalo and Lake Huron R. W. Co.	25 U. C. R. 160	579, 582
Swansea, Mayor of, v. Thomas	10 Q. B. D. 48	277
“ Shipping Co. v. Duncan	1 Q. B. D. 644	104
Swire v. Redman	1 Q. B. D. 536	699
Switzer v. Boulton	2 Gr. 693	446
Sykes v. Beadon	11 Ch. D. 170	211

T.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Tarleton v. Staniforth	5 T. R. 695	324, 325
Taylor v. Caldwell	3 B. & S. 826	608
“ v. Chester	L. R. 4 Q. B. 309.....	205, 210, 211, 222
“ v. St. Helens	6 Ch. D. 264	3
“ v. The Queen	1 S. C. R. 65	424
Telfer v. Northern R. W. Co	30 N. J. (Law) 188	247
Terwit v. Gresham	1 Ch. Cas. 73	450, 454
Thompson v. Hudson	L. R. 4 H. L. 1	327
“ v. Kinckerbocker Life Insurance Co.	5 Big. Ins. Cas. 8 ; 104 U. S. 252.	313 314, 319, 570
“ v. Wilkes	5 Gr. 594	81
Thrustout dem. Turner v. Grey	2 Str. 1056	428
Tillett v. Ward	10 Q. B. D. 17	631
Tipling v. Cole, In re	21 O. R. 276	584, 585, 588
Tolhausen v. Davies	57 L. J. Q. B. 392 ; 59 L. T. N. S. 436	57, 629, 630
Toms v. Township of Whitby	35 U. C. R. 195 and 37 U. C. R. 100.....	51
Toronto Street R. W. Co. v. Fleming ..	35 U. C. R. 264 & 37 U. C. R. 116..	134
Towers v. Dominion Iron and Metal Co..	11 A. R. 315	676
Treadwell v. Williams	9 Bosworth 649	292
Trimble v. Hill	5 App. Cas. 342	414
Trust & Loan Co. v. Fraser	18 Gr. 19	37
Tufton v. Harding	6 Jur. N. S. 116	357
Turner, In the Goods of	64 L. T. N. S. 805.....	540, 546, 557
“ v. Barlow	3 F. & F. 946	331
“ v. Postmaster-General	34 L. J. M. C. 10	644
“ Thrustout dem., v. Grey	2 Str. 1056	428
Twomley v. Central Park, etc., R. W. Co.	25 Am. R. 162	52
Twycross v. Grant	4 C. P. D. 40	687
Twynam v. Pickard	2 B. & Ald. 105	277

U.

Udy v. Stewart	10 O. R. 591	684, 687
Union Bank v. Neville	21 O. R. 152	490, 500, 691

V.

Vallance, In re	26 Ch. D. 353	208, 212
Van Cutsem, In the Goods of	63 L. T. N. S. 252.....	542, 557
Veitch v. Russell	3 Q. B. 928	337
Venner v. Sun Life Insurance Co	17 S. C. R. 394	189
Vera Cruz, The	10 App. Cas. 59.....	446, 447, 452, 458

W.

Walker, Re	6 A. R. 169..406, 407, 408, 409, 410, 411	
“ v. Goe	3 H. & N. 395	284, 287
“ v. Jones	L. R. 1 P. C. 50	695, 697
“ v. Niles	3 Ch. Ch. 59.....	357
Wall v. Home Insurance Co.....	36 N. Y. 157.....	188

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Walsh, ex parte	28 N. B. 214	640
Ware v. Millville Fire Insurance Co.	45 N. J. 177	330
Waring v. Ward	7 Ves. 332	81, 99, 102
Want v. Blunt	12 East 183	316, 325
Warwick v. Foulkes	12 M. & W. 507	186
Wasmer v. Delaware, etc., R. W. Co. . .	80 N. Y. 212	52, 61, 630
Watson v. Weekes	59 L. T. N. S. 436	629
Waugh v. Morris	L. R. 8 Q. B. 202	212
Webb v. Catchlove	82 L. T. J. 103	269
“ v. Hewitt	3 K. & J. 438	301, 304
Weir v. Canadian Pacific R. W. Co.	16 A. R. 100	248, 579
“ v. St. Paul, etc., R. W. Co.	18 Minn. 155	17
Wells v. Independent Order of Foresters. .	17 O. R. 317	263
Welsh, Ex parte	28 N. B. 214	640
Wentworth v. Hamilton	34 U. C. R. 585	534
West Nissouri v. North Dorchester	14 O. R. 294	233
Whaley v. Norton	1 Vern. 483	217
Wheeler v. Wheeler	5 Lansing 355	211, 213, 218
“ v. Le Marchant	17 Ch. D. 675	269
Whidden v. Jackson	18 A. R. 439	411
Whitaker v. Forbes	L. R. 10 C. P. 583 ; 1 C. P. D. 51.	181, 650
White v. Parker	16 S. C. R. 699	446, 447, 684
“ v. Steele	12 C. B. N. S. 383	281
Whitman v. Boston, etc., R. W. Co.	3 Allen. 133	21, 32
Wiedemann v. Walpole	[1891] 2 Q. B. 534	665
Wiles v. Suydam	64 N. Y. 173	Appendix IX
Willcock v. Terrell	3 Ex. D. 323	368
Willet v. Sandford	1 Ves. Sr. 178	541, 542, 557
Williams v. Balfour	18 S. C. R. 472	99
“ v. Jackson	5 Johns. 489	427
“ v. Williams	9 W. R. 296	424
Williston v. Lawson	19 S. C. R. at p. 678	81
Willmott v. Barber	15 Ch. D. 96	330
Wills v. Carman	17 O. R. 223	509, 510, 511, 512, 513, 514, 515
Willyams v. Bullmore	33 L. J. Ch. 461 ; 32 Beav. 574	220
Wilson v. Hutton, In re	23 O. R. 29	585
“ v. Lloyd	L. R. 16 Eq. 60	303
“ v. Robinson	7 Q. B. 68	186
“ v. Squire	1 Y. & C. C. C. 654	162
Wilton v. Northern R. W. Co	5 O. R. 490	56, 60
Wing v. Harvey	5 D. M. & G. 265	189, 194, 196
Wisconsin v. The Pelican Insurance Co. .	127 U. S. 265	Appendix V.
Wolcott v. Knight	6 Mass. 418	427
Wood v. Wood	L. R. 1 P. & D. 309	559
“ v. Gray	[1892] A. C. 16	452
Woodard v. New York, etc., R. W. Co. .	106 N. Y. 369	248
Woods v. Caledonian R. W. Co.	23 Sc. L. R. 798	52, 61
Worden v. Guardian Mutual Life Insurance Co.	39 N. Y. Sup. Ct. 317	333
Worthington v. Scribner	109 Mass. 487	271
Wreck Recovery and Salvage Co., In re. .	15 Ch. D. 353	602
Wyke v. Rogers	1 D. M. & G. 408	301

Y.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Yates v. Milwaukee	10 Wall. 497	438
Yeomans v. County of Wellington.....	4 A. R. 301	114, 117
York, Doe dem., v. Walker.....	12 M. & W. 591.....	541
Young v. Hannibal, etc., R. W. Co	82 Mo. 427	579
“ v. Irwin	1 Haywood 371	431
“ v. Smith	29 C. P. 109	275
“ v. Tibbitts	32 Wisc. 79	667

Z.

Zimmer v. Grand Trunk R. W. Co.....	19 A. R. 693	446, 451
Zohrab v. Smith, In re	17 L. J. Q. B. 174	585

ERRATA.

Mason v. Johnston, 20 A. R. 412, at page 420, line 1, for "1877" read "1887."

Brown v. Moyer, 20 A. R. 509, at page 511, line 12, for "defendant" read "plaintiff."

Regina v. Hazen, 20 A. R. 633, at page 633, line 9, for "*Walker v. Hamilton*" read "*Hamilton v. Walker*."



ONTARIO APPEAL REPORTS.

VILLAGE OF NEW HAMBURG V. COUNTY OF WATERLOO.

Municipal corporations—Bridges—Rivers—Waters—R. S. O. ch. 184, secs. 532, 534.

Under sections 532 and 534 of the Municipal Act, R. S. O. ch. 184, county councils are directed to build and maintain "all bridges crossing streams or rivers over 100 feet in width * * * connecting any main highway" :—

Held, per HAGARTY, C. J. O., and BURTON, J. A., agreeing with the Queen's Bench Division, that the width of the water in its natural flow at ordinary high water-mark was the test of the width of the stream or river for the purposes of the sections ; and

Per OSLER, and MACLENNAN, J.J.A., that the width of the water at the highest or flood levels which are ordinarily reached every year was the width to be measured for bridge purposes.

In the result, the judgment of the Queen's Bench Division, 22 O. R. 193, was affirmed.

THIS was an appeal by the plaintiffs from the judgment Statement. of the Queen's Bench Division, reported 22 O. R. 193.

The action was brought to determine upon whom lay the duty and obligation of building and maintaining a bridge across the river Nith; the bridge being, it was contended, necessary to connect a main public highway running through the county of Waterloo, passing through the village of New Hamburg. The question arose under sections 532 and 534 of the Municipal Act, R. S. O. ch. 184. By the former section, county councils have jurisdiction "over all bridges crossing streams or rivers over 100 feet in width, within the limits of any incorporated village in the county, and connecting any main highway leading through the county," and by the latter section it is made the duty of the county council to build and maintain at the expense of the county all bridges of the character mentioned in the

Statement. former section. There had for many years been a bridge across the river Nith at the place in question, originally built by the plaintiffs, the defendants having made to them a grant of \$1,000 in part payment of the cost thereof, and the defendants contended that the plaintiffs were estopped from now denying liability.

They also contended that the river Nith was not more than 100 feet in width at the point where the bridge was needed.

The action was tried at Stratford, on the 15th of May, 1891, before FERGUSON, J., who gave judgment in favour of the plaintiffs, his view being that in ascertaining the width of the river for the purposes of the Act, the measurement should be made from the top of the bank on the one side to the top of the bank upon the other side, or, where the bank upon the one side was higher than the bank upon the other, to a point in the higher bank at the same level as the top of the lower bank, and holding upon the evidence that, measured in this way, the river was more than 100 feet in width.

Upon motion to the Divisional Court this judgment was reversed, that Court holding that the liability was to be determined by the width of the water in the natural channel of the river at its highest ordinary state, but giving the plaintiffs leave to adduce further evidence to show that measured even in this way the width was more than 100 feet.

The plaintiffs appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 18th of October, 1892.

W. R. Meredith, Q. C., for the appellants. The sole question in this appeal is as to the proper mode of measurement. It is submitted that the word "river" must be construed in a reasonable practical way, and must mean a river in the sense in which one would regard it from a bridge-maker's point of view. A bridge from ordinary

high water-mark to ordinary high water-mark would be, *Argument.* during a great portion of the year, practically useless. The question must be decided from a common sense point of view, and it is clear that what is intended is that any portion of the territory that requires to be bridged must be taken to be part of the river within the meaning of the section. If a bridge of over 100 feet is reasonably requisite to connect a highway of the kind mentioned, then it must be built and maintained by the county. A river includes much more than water merely; it consists of water, bed, and banks: Gould, 2nd ed., sec. 41; Angell, 7th ed., sec. 4. The river here in question has well defined banks, and it is not necessary to consider a case that might arise, if near a river there were low lying adjacent ground which might sometimes be flooded for a great distance. In such a case the second banks, if the term may be used, would of course not be the measuring points. *Rex v. Inhabitants of Oxfordshire*, 1 B. & Ad. 289, is much relied on by the defendants. It is really a case in favour of the plaintiffs. The question in that case arose under a statute requiring counties to maintain bridges. It was there recognized that the bridge from bank to bank was within the Act, but that what may be called an extension across the adjacent flats was not within the Act. It was not, however, held that it was only necessary to bridge the actual water. See also *Rex v. Trafford*, 1 B. & Ad. 874. There is nothing in these cases to restrict the meaning of the word "river." The different cases cited as to boundaries such as *Taylor v. St. Helens*, 6 Ch. D. 264; *Plumb v. McGannon*, 32 U. C. R. 8, have no real application to a case of this kind. In *McHardy v. Ellice*, 1 A. R. 628, Patterson, J., points out that the Legislature was not likely to leave a question similar to that now in issue, to depend on varying opinions whether water-courses of a certain kind might be properly considered streams or rivers. The same principle applies here. There would be uncertainty, conflict, and change, if the respondents' contention is right. All practical arguments are strongly in favour of the view that the word is used in

Argument.

its widest sense. It is admitted that the measurement is to be made where the bridge is required, and surely it is reasonable that the width of the bridge there necessary is what is to be looked at.

John King, Q. C., for the respondents. The construction contended for by the appellants, while at first sight appearing in the present case not unreasonable, would really, however, in many cases result in great injustice being done. It is a matter of common knowledge that many rivers have long shelving banks, and if the appellants' view is adopted, the obligation of building bridges would be thrown on the county, where by a little extra expenditure a shorter bridge could be made to answer all the necessary purposes, and would have to be constructed by the village. The only way to decide the matter fairly is to keep to the strict legal construction of the words used. It can scarcely be contended that it is intended to cast upon the county the obligation to build a bridge that will cover all the space that may at any time be covered by water, no matter how great a freshet may occur. If then, there must be some exceptions, the true way to determine the question is to take the width of the water at its highest ordinary state. There is a distinction between a river and its banks, and the narrower construction should be adopted here. This view is strongly supported by the case of *Howard v. Ingersoll*, 13 How. 381. The appellants, however, are estopped by the fact that they themselves erected a bridge across the river at the place now in question some years ago, and so interpreted the section as is now contended for, and there has been no change in the law since then. Moreover, there is not any absolute duty to build and maintain such a bridge. It is a question of discretion, and the real necessity for the bridge has not been shown.

W. R. Meredith, Q. C., in reply. This is not a question of discretion. The bridge is admittedly necessary, and must be built by either the county or the village.

December 24th, 1892. HAGARTY, C. J. O. :—

Judgment.

HAGARTY,
C.J.O.

I feel much difficulty in this case.

Without the light of any legal authority bearing on the point, I think I would read the language in question—solely guided by its interpretation of itself—as indicating a stream or river over 100 feet in width, not merely at its average height, but to whatever height it was accustomed to reach after any heavy rainfall, or in what is known as a spring freshet.

Where the stream has well defined bounds or banks, and the water at such times rises to the top thereof, it would seem that in legislating on the subject of bridging such streams, the width thereof would most naturally be regarded as the tops of its banks to which it rose every year at rainfalls or freshets.

I do not mean an abnormal rise of water occurring at intervals of years of extraordinary height, but the constant result of every year's experience.

The object is to bridge the stream. It would be necessary for the safety of any such structure, that it should stand clear above any height to which the water would occasionally rise.

The bridge is treated as part of the highway, which is thus carried, as the books say, "*super flumen vel cursus aquæ.*"

But when we look at the statute, we find the words are used for the purpose of adjusting and distributing the rights and liabilities of municipalities as to bridges.

They adopted the width of the rivers or streams as the test of liability; where the river was over 100 feet in width, the county had to maintain.

We must, therefore, consider what was the width of this river, as understood in the law of the land.

It seems to me that the width must mean the width in its natural flow up to the ordinary mark at high water; not the high water of a freshet or heavy rainfall but the high water-mark in its ordinary flow.

Judgment.

HAGARTY,
C.J.O.

This appears to me to be the legal understanding as to how a stream or river is to be measured in ascertaining what it is and its extent.

I think that there can be no other guide in a case like this of apportioning liabilities than the adoption of this principle.

The volume of water at its highest normal or ordinary flow can be ascertained without much difficulty and must govern.

If a river with no well defined bank had on either side a very low lying tract of land over which whenever a freshet came, its waters extended, I think its width, in ordinary phrase, must still be to its ordinary high water level, not to the height of the casual overflow.

In this particular case, I think this construction may, perhaps, work a hardship on the village. But the rule is of general application, and I can see no other way to apply it except as held in the Court below.

BURTON, J. A. :—

The sole question on this appeal is, whether the river Nith is a river over 100 feet in width within the meaning of sections 532 and 534 of the Municipal Act, the former of which places under the jurisdiction of the county council "all bridges crossing streams or rivers over 100 feet in width within the limits of any incorporated village in the county, and connecting any main highway leading through the county"; and by the latter the duty is cast upon the county council to build and maintain at the expense of the county all bridges of the character mentioned in the previous section.

Some years ago in *McHardy v. Ellice*, 1 A. R. 628, a question came before this Court as to whether a bridge crossing a small stream some thirty or forty feet in width, was a bridge crossing a river within the meaning of section 413 of the Municipal Act, and this Court, reversing the judgment of the Court below, held that the stream was a river within the meaning of the Act.

The remarks of Mr. Justice Patterson are not without weight, in considering the further question which we are now called upon to decide: "We must give the Legislature credit," he says, "for having in view something more practical than to leave an important duty like the building of a bridge to fall on one municipality or another, or to be bandied from one to another, as opinions happen to vary in according or denying to the particular stream the dignity of a river. The word 'river' is used for another purpose than merely designating a stream which has a certain minimum volume of water, or height of bank, or width of bed."

Judgment.

BURTON,
J.A.

Here, however, the Legislature has defined the kind of stream in respect of which the obligation is to arise—viz., a river of 100 feet in width, and the question is, how is the measurement to be made.

I do not think the authorities in reference to boundaries have any application, and cannot assist us.

Mr. Justice Ferguson has held that inasmuch as the bridge which is necessary in order to connect the two banks of the river and the highway on each side of it is over 100 feet in length, it comes within the Act, treating the top of the bank as part of the river. I was at first inclined to that view, but further reflection has convinced me that the judgment of the Divisional Court is correct, or is at all events so open to doubt as to render it our duty to affirm, leaving it to the Legislature to interfere if they deem it a proper case for interference.

It is quite true, as was urged upon us by counsel, that a river, in its widest sense, consists of the water, the bed or alveus through which it flows, and the banks; and some of the expressions to be found in the books would at first seem to countenance the view of Mr. Justice Ferguson.

No one who has visited the Saguenay, would for a moment regard the summits of the rocks which form the banks of that stream, as part of the river; and all the authorities on the subject contain some limitation.

Bouviere, for instance, says banks of rivers contain the river in its natural channel where there is the greatest flow of water.

Judgment.

BURTON,
J.A.

Mr. Justice Story defines shores or flats to be the spaces between the margin of the water at its low stage, and the banks which contain it in its greatest flow.

Again, in the words of the Digest, that is considered to be banks which contain the river when *fullest*. The commentary of Grotius on this passage is: "This signifies that that space next to the bank which is sometimes not occupied by the river when reduced by heat in the summer season is not a part of the bank, but of the bed. It is the space between the banks occupied by the river at its *fullest* flow."

This defines high water-mark, while the space through which the river flows at its ordinary lowest flow defines the low water-mark, the space between those marks being shore.

The words "fullest," "fullest flow," etc., to be found in these extracts must, however, be read as meaning in its fullest state naturally, and not to include cases when temporarily overflowed by extraordinary rains.

The bank of the river then is, Mr. Houck remarks in his work on navigable waters, no part of the bed, for the bank ends at the line to which the water rises at its highest flow naturally, and although the space next below it is sometimes uncovered by the river when reduced to its lowest flow yet that space so uncovered is not part of the bank but of the bed of the river. It follows then that all water contained in the river's bed between the two banks, or their high water-line, is river. If the water at that height is over 100 feet wide the obligation to bridge that river is upon the county, if less it falls upon the village.

To read it otherwise, would amount to this, that whenever the crossing of a river involves the necessity of building a bridge exceeding 100 feet in length, the obligation shall be on the county; it is sufficient to say that the Legislature has not said so, but has confined the liability to those cases in which the river itself exceeds that width.

The learned Judge at the trial pointed out the difficulty of ascertaining high water-mark, but that can be no reason

for imposing a different burden upon the defendants from that which the Legislature intended. In a case decided by the Supreme Court of the United States, *Howard v. Ingersoll*, 13 How. 381, Mr. Justice Curtis dealt with a similar question in this way: "This line is to be found by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the soil itself. * *

But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearance they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality, grows wherever the bank is not too steep to admit of such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water."

The appellants have no doubt satisfied themselves that according to the mode of measurement decided as the correct one by the Queen's Bench, the river did not exceed 100 feet in width as they have appealed against the decision, instead of availing themselves of the offer to give further evidence.

The appeal should, I think, be dismissed.

OSLER, J. A. :—

In considering what is meant by the width of a stream or river in these sections of the Municipal Act, we must bear in mind that the evident intention of the Legislature was to cast upon the county municipality the jurisdiction over, and the liability to build, maintain, and keep in repair long and expensive bridges, where in a certain case they are necessary to connect a public highway leading through the county.

Judgment.

BURTON,
J. A.

Judgment.

**OSLER,
J.A.**

The particular case is of such bridges, crossing, or on, any river or stream over 100 feet in width within the limits of any incorporated village. The Legislature was not regarding the river or stream as a boundary in any sense. They were looking at it as an object necessary to be bridged for the purpose of connecting the highway, and it is the width of the stream which determines the minimum length of the bridge.

This, it appears to me, is not necessarily its width at low water, nor its width at high water, nor its width at its highest ordinary state. In any of those conditions, it may not be over the width of 100 feet; yet if there be any other condition in which it exceeds it, the same necessity for bridging it exists, and therefore I am unable to understand on what ground we can say that its width in that condition is to be disregarded and said to be not the width meant by this legislation. We speak, I think, with perfect accuracy of the width of a river or stream at its highest or flood height, where on such occasions it flows, as it does in this case, and as the photographs produced at the trial show, between banks more or less well defined, capable of being bridged, and necessary to be so, even were its width at this extreme height no more than fifty feet. Where its width at that height under those circumstances is over 100 feet, it comes within the words of the Act, and I see no just reason to construe them by the light of decisions pronounced under wholly different circumstances, and considering the meaning of the word "river" in relation to other objects and purposes than that in reference to which it is to be looked at here. I entirely concur in the judgment about to be delivered by my brother MacLennan, and therefore think that the judgment of the trial Judge was right, and ought not to have been set aside.

MACLENNAN, J. A. :—

I am of opinion that this appeal should be allowed.

The single question is, what is the construction to be put upon the words "stream or river over 100 feet in

width," as used in section 534 of the Municipal Act, R. S. O. ch. 184. The learned trial Judge held that in order to ascertain the width for the purpose of the Act, the measurement ought to be from the brow of one bank to the brow of the other bank if the one bank were only a little higher than the other, or if the two banks were of the same height; that being the condition of things in this case. The Divisional Court, on the other hand, held that mode of measurement improper, holding that "the width of the natural channel of a stream or river, shews the width of the stream or river, for it shews the limits of the volume of its water in its ordinary state of high or low water." The meaning of the learned Chief Justice, who delivered the judgment of the Court, is made more clear by the following language. He says: "The width of the water in a stream or river does not accurately denote the width of that stream or river, for the water in a stream or river varies in volume;" and again: "No doubt in freshets, and unusually high water, these limits (that is, the limits of the volume of water), would be exceeded; but such condition of the stream or river should not be taken into account in determining the width of the stream or river, but only the condition of the stream or river in its highest ordinary state;" and again: "The natural channel of every stream or river is generally apparent and easily ascertainable, and furnishes, in our opinion, the only proper measure of the width of the stream or river within the meaning of these provisions."

Judgment.
MACLENNAN,
J.A.

As I understand it this may be expressed in other words thus: The width of the natural channel is what is meant in the statute. The limits of that natural channel are generally apparent and easily ascertainable, and it is the space occupied by the water in its highest ordinary state. Now, the only reason given for this conclusion seems to me to be insufficient. It is that the width of the water does not accurately denote the width of the stream, for the water varies in volume. If the learned Chief Justice here means the average width of the stream or its width at ordinary,

Judgment. which perhaps means average, high water, then certainly
MACLENNAN, the width of the water at other times would not denote the
J. A. width of the stream at those times. But I cannot understand how it is that the width of the stream does not vary with the width of the water which composes it.

The truth seems to be that the width of a stream varies between its width at its lowest summer level and its width at the highest flood level, and that its width at those extreme times, and also at any intervening time, is its true width at those times respectively. The language used in the Act is "river or stream," words which are often used interchangeably, and both of which are sometimes used to signify the flowing water merely, and at other times not merely the flowing water, but the alveus or bed or channel in which it flows as well. Properly speaking, the banks are no part of the river any more than the sea shore is part of the sea. The essential thing in a river is the flowing water, the width of which is variable; but if the bed is regarded, that is a part of it which varies but little in width from year to year.

Many authorities were cited to us illustrating the meaning of the word "river" or "stream." I have not found these authorities of much assistance, for it is evident that the meaning varies very much according to the occasion of its use. If I say, he swam the river on such a day at such a point, that would be a perfectly correct use of the term river, and would mean the water merely; and if we were asked the width of the river that was crossed by swimming, the true answer would be the width of the water at that time and place. No one would think in such a case of including any part of the banks in the measurement, or of making any enquiry about high or low water, or the width of the natural channel. So also it would be if the river were crossed in a boat. It would be the same if the question were the width of a river or stream at a certain ferry. In all these cases, the width of the river would be greater when the water was high, and less when it was low; and I am unable to see how the actual width of the water at

its highest flood level would not be the true width of the river at that particular time.

Judgment.
MACLENNAN,
J.A.

There is, therefore, as I think, nothing that can properly be called the width of a river or stream in an absolute sense. It varies according to circumstances. It may mean the width of the water, which may vary from day to day, or it may mean the width from bank to bank, or from brow to brow, which varies but little. And what we have to determine is, what width is meant in this clause of the statute.

It seems to me impossible to arrive at a solution of this question without attending to the subject with which the Legislature was dealing. What the Legislature desired to do, was to relieve village municipalities from the burden of building and maintaining certain bridges of large size situate within the village limits, but to leave upon them the burden of building and maintaining all small bridges. For this purpose it was necessary to define what bridges should be built and repaired by them respectively; and that was done by the section under consideration, which declared that the counties should build and repair all bridges over rivers and streams over 100 feet in width, leaving all others to be attended to by the village municipalities. The kind of bridges referred to, are bridges necessary to connect any main public highway leading through the county. That, in my opinion, affords the key which solves the question. There is a highway leading through the county, and that is to be connected by a bridge across the river or stream. If the river or stream is over 100 feet wide, the building and repair of the bridge is the county's business; if it is 100 feet or under, the village must attend to it. The Legislature is dividing bridges into two classes; the larger for the care of the county, and the smaller for the care of the smaller municipalities; and they do this by dividing the streams to be bridged into two classes—namely, those over 100 feet, and those 100 feet or less in width; and it seems to me the proper thing to do is to ascertain in each case how much of the river or

Judgment. stream is to be spanned by such a bridge as it is proper
MACLENNAN, and reasonable in the particular case to build, in order to
J. A. connect the highway. The question in such case is, what
is it that is to be bridged? Is it the stream or river in
its lowest condition, or in its highest condition, or in some
average intermediate condition? If it is the second, then
surely that is what is to be measured for the purpose of
the classification intended by the Legislature. It is surely
obvious that the place where the bridge is to be built, is the
place where the width is to be ascertained, and not above
it or below it, or by taking an average of the width for
some distance above or below. This was conceded. But
it is surely equally obvious that the width referred to is
the width for bridge purposes. The kind of bridge which
is contemplated is not a temporary structure for a day or
a month, but a permanent and durable one, for the whole
year round, and for many years, as many as possible. So
also it is not a bridge for low water or summer level, or
for average, or even for high water merely, but it is to be
a bridge for the highest or flood water as well. If, there-
fore, a stream be over 100 feet wide in flood water, seeing
that a reasonably suitable bridge must be made sufficient
for that state of the stream, I think we ought to hold that
to be a stream within the meaning of the statute, and one
to be bridged by the county, and not by the village. I
think, with great respect, that the mode of measurement
adopted by the Divisional Court is purely arbitrary, and
that there is no more reason for adopting it than for adopt-
ing average low water, or the width on some named day in
the year.

The learned counsel for the respondents admitted at the
trial, and on the argument before us, that "it would not
be fair to take the width in the low season," that is, at the
time of low water. Why not? Is it not because it is to
be measured for bridge purposes, and that bridges are not
built with reference to the lowest state of the water? If
that is the reason, and I think it is, then it follows that it
is the highest state of the water that is to be regarded, and

not merely its average height, as contended by Mr. King. A bridge, if ordinary prudence and forethought are employed, is built so as to be durable and reasonably safe against flood water, so that the builders may not be like the foolish man who built his house upon the sand, which fell when the wind blew and the floods came.

It is not necessary to consider the case of some extraordinary flood which overflows the banks of the stream altogether, and spreads far and wide over the adjacent country. We have not to deal with that case, but with the flood levels which are ordinarily reached every year, and against which it is the part of prudence in bridge building to provide. Inasmuch as the stream or river is to be bridged, and inasmuch as in sense and reason and legal obligation it is to be bridged up to and inclusive of flood water, in my humble judgment that is the condition of the stream in which the width is to be ascertained for the purposes of this statute, and not at any lower state of the water.

The evidence shews that applying this test this stream or river is over 100 feet in width, and therefore judgment ought to be for the appellants.

Judgment.
MACLENNAN,
J.A.

*The Court being equally divided,
the appeal was dismissed with costs.*

IN RE PRYCE AND THE CITY OF TORONTO.

Municipal corporations—Local improvements—Ways—Damages—Benefit—Set-off—R. S. O. ch. 184, sec. 483.

In an arbitration under the Municipal Act, R. S. O. ch. 184, sec. 483, it is proper to allow as against the amount of damages sustained by an owner of property by reason of the work in question, any enhancement in value to the property derived specifically from the work in question, notwithstanding that such enhancement in value is one common to all the property affected.

The amount assessed against the owner as his share of the cost of the work should be added to the damages or deducted from the set-off.

Judgment of STREET, J., 16 O. R. 726, affirmed; BURTON, J. A., dissenting.

Statement.

THIS was an appeal from the judgment of STREET, J., reported 16 O. R. 726.

The appellant was the owner of certain land fronting on Ossington avenue in the city of Toronto and claimed from the city damages occasioned by the raising of the grade of the street opposite to her land in grading and block-paving the street as a local improvement. The claim was referred to an arbitrator who made an award in favour of the claimant for \$225 and costs.

The city moved against the award and the motion was heard before STREET, J., on the 19th of February, 1889, when he referred the matter back to the arbitrator with a direction that there should be allowed to the city "as against the damage occasioned to the property of the claimant by reason of the said improvement, any advantage that the said claimant had derived therefrom, notwithstanding that such advantage may have been so derived by the claimant in common with other property owners of the said street or by the property of the claimant in common with other properties on the said street."

The claimant appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN JJ.A., on the 12th of October, 1892.

Lash, Q. C., and J. E. Robertson, for the appellant. The learned Judge in arriving at his conclusion relied on certain decisions under the Railway Act but in doing so we

submit that he was in error. It is not unreasonable that a claimant of damages against a railway should be charged with the benefit that his property has received from the railway itself, for in such a case the claimant is not taxed for or charged with any share of the cost of the work. But the injustice of a case like the present is apparent and we submit that nothing is chargeable against a claimant except such benefit as is peculiarly given to the specific property in question and not such a general benefit as is derived from the work in question by all the properties affected by the work. If A is benefited by a certain work and is not damaged at all, and B is benefited by the work in the same way as A, but is peculiarly damaged by it, it is very unfair that B's damages should be reduced. The English cases do not apply as there the benefit is not required to be set off. The American decisions under similar statutes clearly shew that only any peculiar benefit is to be set off: 3 Sedgwick on Damages, 8th ed., sec. 1129, p. 371. For instance take a road. It may drain, and so peculiarly benefit, a specific lot, and the amount of that benefit may fairly be set off; but in addition the road when completed may be a new or more useful outlet benefiting the whole neighbourhood and a benefit of this kind should not be set off. The words "any benefit" were construed in this way in *Weir v. St. Paul, etc., R. W. Co.*, 18 Minn. 155. That case, it is true, turned on the provision of the American Constitution requiring compensation to be made where property is taken. The section however here in question is in almost the same words as the provision of the American Constitution and if the wide construction is repugnant to that provision then also it is repugnant to the section of our Act. To give the wide construction contended for by the city would be in effect to allow property to be taken without any compensation at all. The general benefit would be offset by the specific damage, and the owner would be taxed for a work from which he derives no pecuniary advantage whatever. See Mills on Eminent Domain, 2nd ed., sec. 152; Lewis on Eminent Domain, sec.

Argument.

Argument. 471; *Eagle v. Charing Cross R. W. Co.*, L. R. 2 C. P. 638; *James v. Ontario & Quebec R. W. Co.*, 12 O. R. 624, 15 A. R. 1; *In re Ontario & Quebec R. W. Co. and Taylor*, 6 O. R. 338; *In re Credit Valley R. W. Co. and Spragge*, 24 Gr. 231; *In re Colquhoun and Berlin*, 44 U. C. R. 631.

C. R. W. Biggar, Q. C., for the respondents. It may be admitted that an apparent unfairness would result in certain cases by following the rule laid down in the Court below, but one cannot take into consideration the result as between one lot owner and the adjoining lot owners, but must treat the case as one simply between the particular lot owner and the corporation. Looking at it in this way it is not unreasonable to say that if the owner ask damages against the city then that owner must give the city credit for the increase in value of the property in question effected by means of the work complained of. It is not possible to draw any distinction between the provisions of the Railway Act and the provisions of the Municipal Act. The section is very clear. "Any advantage" is to be set off and it is none the less an advantage to the claimant because also an advantage to others. In addition to the cases cited on behalf of the appellant see *Great Western R. W. Co. v. Baby*, 12 U. C. R. 106; and *In re Canada Southern R. W. Co. and Norvall*, 41 U. C. R. 195. There is great conflict in the American Courts as to the point in question, but the New York and Massachusetts Courts, among others, uphold the rule now contended for: 3 Sedgwick on Damages, 8th ed., p. 408; *Genet v. City of Brooklyn*, 99 N. Y. 296; *Sexton v. North Bridgewater*, 116 Mass. 200.

Lash, Q. C., in reply.

December 24th, 1892. OSLEB, J. A. :—

It appears that the defendants graded and block-paved a street called Ossington avenue as a local improvement under the provisions of a general by-law passed by them under the Municipal Act. The plaintiff's premises fronted

on the street and her contention was that they had been injuriously affected by reason of the exercise of the defendants' powers under the by-law referred to. The work in question appears to have been done by the council as a local improvement on the initiative plan and not on petition by the property owners.

The nature of the damage and injury sustained by the appellant was that by reason of the raising of the grade in front of her property it had become necessary to fill up the lot to the level of the street grade and to raise a house which she had previously erected thereon.

As against the damage and injury thus suffered by her the respondents gave evidence that in consequence of the grading and paving of the street there had been a general rise in the value of all the property on the street, including that of the appellant, which more than covered the special loss or damage she complained of. This rise in value, as applied to her lot, the city contended that they were under the statute entitled to set off as an advantage derived by her from the work in question. The arbitrator made an award in her favour for \$225 against which the city appealed to a judge in court.

On the argument of that appeal counsel appear to have conceded that the amount of the award had been arrived at by excluding from consideration any benefit occasioned to the property by the improvement, and the learned Judge being of opinion that this was erroneous referred the award back to the arbitrator, with a direction that he should allow to the city as against the damage occasioned to the property by the improvement any advantage that the claimant had derived therefrom, notwithstanding that such advantage might have been so derived by her in common with other property owners on the street. From that judgment the present appeal is brought. The question to be determined is the meaning of section 483 of the Municipal Act, which enacts that the council shall make to the owners of real property entered upon, taken, or used by the corporation in the exercise of any of its powers, or injuriously

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

affected by the exercise of its powers, due compensation for any damages necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work.

No distinction is made between money to be paid for the purchase or price or value of lands taken and money to be paid for lands injuriously affected. The terms "due compensation" and "damages" are used to express both. The question is, what is the nature of the advantage which may be thus set off against the compensation for land taken, or injuriously affected where no land is taken. "General benefits," it is said, cannot be set off, and the course of decision in the United States courts is in favour of that view. Our own cases are not opposed to it, and it is no doubt most just to the landowner.

The great contest has been as to what are general benefits which may not be set off as distinguished from peculiar and special benefits or advantages which may. An increase in the value of the adjoining land not taken, or of land injuriously affected in consequence of the improvement, is of course an advantage which the owner derives therefrom, but the plaintiff's contention is that it cannot be set off unless it arises from some direct or special advantage or benefit which the property receives, peculiar to itself, caused by the improvement, not shared in by, or common to, others, as for example a special facility for drainage, increase of frontage, making the lot a corner lot, etc., and that if it is merely a general rise in market value consequent upon the construction of the improvement, which is shared in by all other properties in the neighbourhood, that is not, within the meaning of the Act, an advantage derived from the work. It appears to me, however, that we have no right so to limit the plain language of the Act as to hold that an increase in market value consequent upon the construction of the improvement is not an advantage subject to be set off against the compensation. I think that is the principle, but there is also a distinction, the application of which prevents injustice and places the claimant on an equal

footing with others whose land is not taken or injuriously affected. The distinction is this, that the general benefit which ought not to be deducted is that general improvement or rise in value which the property may be said to share in common with all other property in the neighbourhood, and not merely with that immediately adjoining the work or improvement in consequence of its construction; while the special and peculiar benefit which is the subject of set-off is so much of the increase or rise in value as may be found to be directly attributable to the particular property over and above that of neighbouring properties in consequence of the location of the work or improvement upon or adjoining it, and also of course of any other special or peculiar advantage. It does not follow that this proportion of the increase in value is to be designated as a general benefit merely because it is common in a greater or less degree to every lot upon the street on which the improvement is effected. It arises from and is caused by the improvement, and is so far direct and special and peculiar to each lot.

Judgment.

OSLER,
J.A.

I refer to the following cases which appear to me to support and illustrate the views I have expressed: *Meacham v. Fitchburg R. W. Co.*, 4 Cush. 291; *Livingston v. Mayor of New York*, 8 Wend. 85, 102; *Whitman v. Boston, etc., R. W. Co.*, 3 Allen 133; *Donovan v. Springfield*, 125 Mass. 371; *Allen v. Charlestown*, 109 Mass. 243; *Cross v. Plymouth*, 125 Mass. 557; *Betts v. Williamsburgh*, 15 Barb. 255; *Palmer Co. v. Ferrill*, 17 Pick. 58.

In our own Courts we find *Great Western R. W. Co. v. Baby*, 12 U. C. R. 106; *In re Ontario & Quebec R. W. Co. and Taylor*, 6 O. R. 338; *James v. Ontario & Quebec R. W. Co.* 12 O. R. 624; *In re Hodgson and Bosanquet*, 11 O. R. 589.

Under the English Railway and Lands Clauses Acts, a question of this kind cannot arise as no set-off of benefit is allowed in case of lands taken or injuriously affected.

The recent case of *Harding v. Board of Land and Works*, 11 App. Cas. 208, an appeal to the Privy Council

Judgment.**OSLER,
J.A.**

from the Supreme Court of Victoria, is, however, somewhat in point. The Act there in question provided that the "arbitrators in assessing such compensation are authorized and empowered, and shall take into consideration the enhancement in value of the adjoining land belonging to the person to whom compensation is to be made, or any other benefit or advantage which such person may or shall obtain by reason of the making of such works or undertaking in reduction of such compensation." One of the questions considered by the Judicial Committee was whether, upon the peculiar wording of the whole section, the term "compensation" included purchase money for land taken as well as damages to land injuriously affected so as to admit of the enhancement in value being set off against both, and it was held that it did not, but it was also held that, as against the damages for injuriously affecting land, the enhancement in the value of the adjoining land was to be set off.

If the answer to the question what has caused the injury of which the plaintiff complains be the raising and grading of the street, the question which follows must be whether she derives any advantage from it. I cannot see how, if the fact be so, a direct increase in value caused thereby, within the limitation I have mentioned, to her adjoining property, is not, within the very words of the Act, an advantage which she derives from the work, and therefore to be deducted from the compensation. No doubt such advantage is often uncertain, indefinite, and to a great extent speculative, depending very much, as all estimates of value more or less do, upon conjecture, and a judicious arbitrator will take care rather to minimize than to exaggerate it. It cannot, however, be rejected from consideration in determining the proper sum to be awarded for the compensation.

I do not see how the fact that the work has been done as a local improvement affects the application of the statute, at all events where it has not been so done at the request of the landowner, which may perhaps make a

difference. It is merely an element in the case to be considered in determining the advantage which the owner derives from the work, by deducting therefrom the amount of the special assessment charged upon her property for the improvement, since to that amount she is already liable to pay for the benefit conferred or supposed to be conferred by the improvement.

Judgment.

OSLER,
J.A.

On the whole I see no reason to interfere with the judgment, and would therefore dismiss the appeal. I have purposely abstained from referring to the provisions of the Railway Acts on this subject, as it does not seem to be quite clear whether a distinction may not be made there similar to that which was drawn in the *Harding* case, or whether there can be any set-off of benefit where land is injuriously affected, without any land being taken. As to this I express no opinion, resting my judgment on the terms of the Municipal Act alone.

As to costs, it seems that the question has been raised in this trifling case for the guidance and benefit of the city in similar cases and therefore I think the dismissal may well be without costs.

MACLENNAN, J. A. :—

I agree in the judgment of my brother Osler, and for the same reasons.

It seems that the appellant's lot is a building lot on Ossington avenue, with a frontage of 142 feet, and, as I understand the evidence, it lies in a ravine or other natural depression. The appellant's husband in his evidence, says: "The lot is below the level of the street. Before the work was done it was twelve feet on the average below the level; it is now thirteen feet three inches below." * * "The present dwelling-house stands eleven feet three inches above the average level of the lot. The house is on a level of the highest part of the lot, and about twenty-one feet above the lowest." In grading the street the corporation, according to his evidence, raised it in front of his lot on an

Judgment. average fifteen inches. It is for this raising of the street
MAOLENNAN, J.A. that the claim for compensation is made. I think for the reasons given by my learned brother, that assuming that the plaintiff's lot was injuriously affected by the raising of the street, yet if the selling value of the land was increased by the work, that is a direct benefit to the appellant which ought to be set off against her claim. I say assuming that the plaintiff's lot was injuriously affected, because I want to guard against being supposed to assent to the proposition that the owner of a lot which is a deep ravine or depression fronting upon an allowance can properly claim to be legally injured because the road is raised to a proper and reasonable grade as required by the public convenience. I wish to add also that, in my opinion, when such a case arises of a set-off of benefit against damage, the landowner's share of the cost of the work should be added to the damage, or which will come to the same thing, be deducted from his benefit, for the reason that he is in effect, to that extent, a purchaser of the benefit received by him from the work.

HAGARTY, C. J. O. :—

It is a matter of regret that a question of such large extent and importance should be raised in the case of a claim so small as the present, and where there has been already an expense so disproportionate to the amount in dispute.

I wish to confine my judgment narrowly to the exact point in this case.

My learned brothers have dealt with the general question involved. I need not go over any very extensive ground.

I am of opinion that in the case of a street in a town or city, block-paved and graded so as to form an improved and good highway in place of one very defective, where the evidence shews that the selling or market value of the properties on either side has been decidedly enhanced by

such improvement, that any claim by a property holder for damages necessarily resulting from the construction or levelling of the improved highway is liable to be off-set under the statute to the extent of such enhanced value.

It seems to me that the construction of a sound level roadway along a street, instead of an occasional quagmire of uneven and broken surface, may reasonably be held to be an enhancement of value intended by the Legislature.

I do not feel called on to go further and discuss the larger question of a railway or other public work opening up a large tract of hitherto inaccessible country.

I do not think this case calls for a decision beyond its own facts.

I agree that the fact of the plaintiff's property having, with the other properties along the street, been charged with the expense of the improvement, should properly be considered by the arbitrator.

It rests wholly with him to decide whether or to what extent, if any, the plaintiff should be liable to the off-set of alleged enhanced value.

I agree that in directing a reference back to the arbitrator we should do so without costs.

BURTON, J. A. :—

The question that comes before us for decision in this case was referred to in *James v. Ontario & Quebec R. W. Co.*, 15 A. R. 1, in this Court, under a somewhat similar provision in the Railway Act, but it did not become necessary to decide it.

Under that Act the arbitrators were directed to take into consideration the increased value that would be given to any land through or over which the railway should pass by reason of the passage of the railway through or over the same, or by reason of the construction of the railway.

In that particular case a portion of the plaintiff's lot had been taken, and the question was how was he to be compensated, and that was arrived at by taking the market

Judgment.
HAGARTY,
C.J.O.

Judgment.

BURTON,
J.A.

value of the whole land before the taking, and the value of the residue after the taking, the difference being the compensation to which the owner was properly entitled. I think such a conclusion was founded on justice and common sense ; but that does not decide the point before us.

In this case the claimant alleges that she has sustained injury by reason of the construction of the work, and that claim has been established ; no land was taken either from her or any other property owner, but her lands were injured so that she was entitled under the statute to be compensated. The language of the statute is, that the city shall make compensation for any damages necessarily resulting from the exercise of the power, beyond any advantage which the claimant may derive from the contemplated work.

The arbitrator refused to take into account any advantage arising to the claimant by reason of the general increase in the value of the land in common with all others whose lands were benefited, but only such special direct and peculiar benefit as accrued to the particular land.

My brother Street was of opinion that the arbitrator should have deducted any advantage that the claimant derived therefrom notwithstanding that such advantage was derived by the claimant in common with the public generally, or by the property of the claimant in common with other properties on the same street, and referred the award back accordingly for that purpose, and the appeal is against that order.

The learned Judge takes the view that if certain other landowners, who do not happen to be damaged, receive the same benefit without having to allow for it, it is a matter for the Legislature to deal with, and not the Courts. I think, on the contrary, that where a manifest inequality of that kind arises from a particular construction of the statute, it furnishes to my mind a strong reason for adopting a construction, if the words will bear it, that does not work that injustice.

The general advantage is purely speculative ; it may

never be realized ; and if it should, not only the other persons assessed but the whole public benefit. Upon what principle then should a person who sustains a peculiar injury, say by his land being flooded, be deprived of that advantage which his neighbour whose land is not injured enjoys ?

Judgment.

BURTON,
J.A.

It is to secure this very advantage that the work is undertaken. The community, and every one travelling over the road, get that advantage. The neighbours on each side of the claimant have their advantages equally with herself, but because her land suffers a peculiar injury she is denied compensation ; in effect the supposed speculative increase in the value of her lot is to wipe out her claim for damages.

As expressed in one case the benefit to be set off must be founded upon something which increases the *actual* or *usable* value of the land, as well as the market or saleable value thereof, and not such market or saleable value alone.

And this seems both just and reasonable. In the case of a railway the increased value is common to the whole community in general, and to each individual to a greater or less extent, and it has no relation to the use of the land itself as land, but is merely an increased market value founded upon extraneous circumstances of increased facilities for public travel and transportation, the benefits of which will be felt to a greater extent by those near the line of the railway, a couple of hundred miles from its head station, than by those within a mile or two from it. In other words, the benefits must be such as are direct, certain and proximate, and not such as are indirect, contingent or remote : See *Roberts v. Commissioners*, 21 Kan. 247. See also the remarks of Chief Justice Bovill in *Eagle v. Charing Cross R. W. Co.*, L. R. 2 C. P. 638, at pp. 641, 642.

I quoted in a former case in this Court (*James v. Ontario & Quebec R. W. Co.*, 15 A. R. 1) the language used in an American case (*Betts v. Williamsburgh*, 15 Barb. 255) as I thought laying down the correct rule.

Judgment.

BURTON,
J.A.

"In estimating the damages resulting from the road, consequential or speculative damages are to be rejected, and in estimating the advantages, such only as are special or peculiar to the property in question are to be considered, and not such as are common to the public."

I do not think the cases referred to on the argument of street openings form any exception to the rule. In those cases usually land which was remote from any street or highway derives a certain value in consequence of a frontage being afforded on each side of the new highway. Those damages are not speculative or remote, but are certain and immediate, and are such as pertain to the ownership, use, and enjoyment of the particular parcel of land, a portion of which is taken, and not unfrequently far exceed the value of the piece taken. See also *Allegheny v. Black's Heirs*, 99 Pa. St. 152.

In the same direction is a case of *Palmer Co. v. Ferrill*, 17 Pick. 58, where a statute provided that where lands were overflowed by the erection of a mill-dam the jury might take into consideration any other damage as well as the damage to the land overflowed, and in off-set thereto, if any there be, any benefit which might result to the complainant by reason of the mill-dam complained of.

It was there said that it was obvious as an immediate consequence of the erection of the dam and raising a head of water, a landowner might sustain damage besides the injury done to the land overflowed, as by obstructing his way, cutting him off from convenient access to part of his lands, disturbing the relations of one part to another; and it was possible that he might in like manner receive benefits from the same cause, that of raising and lowering the water, by the irrigating and fertilizing an arid plain, giving him watering places in dry pastures wherein he had none before; and it was for injuries and benefits like these that the statute intended to provide.

The rule therefore which the Court held to be derived from the statute was to estimate the pecuniary loss arising to the proprietor from the direct injury done to his estate,

taken as a whole, by *flowing*, deducting therefrom any benefit which might be done to the same estate by the same cause, namely, by *flowing*; and that the millowner could not set off any consequential benefits arising to the landowner from the erection of the dam by reason of an increase of population, markets, schools, stores and other improvements in the vicinity to the public.

Judgment.
BURTON,
J.A.

We are not now considering whether the damages awarded are large or not—not having been moved against we must assume them to be fair. What justice or equity then is there in deducting from this sum the value by which all the property has been enhanced by the work, or, in this particular case, wiping it out altogether?

It does not very clearly appear upon the papers, but we were told on the argument, that the work in question to which the injury is attributable, was proceeded with under the local improvement clauses of the Municipal Act. No land is taken. Under these clauses the claimant is compelled to contribute, in common with all the other proprietors of land area affected, according to the benefit derived, in the proportions ascertained in the mode pointed out in the statute. The claimant, therefore, has presumably been made to contribute her full share of these improvements, including compensation for damages, and her land assessed accordingly, and is now called upon not only to lose her contribution to these damages, but to be called upon in effect to pay the whole of these damages again from her own pocket.

It may be that the result of the improvement may be to add something to the market value of the property. Such benefits are generally, as I have said, purely speculative; but whatever they may be, she has already been assessed for them; they are shared equally by those in the neighbourhood where land is not injured, and whose lands are possibly not assessed. They are wholly different from those special benefits or advantages which the particular lot of land receives which are not shared by others.

Judgment.

BURTON,
J. A.

Take for instance a case in which by the construction of the improvement a low or marshy lot had been drained, and for the first time rendered fit for use. I can quite understand that in such a case if the claimant had also suffered an injury the advantage should, in justice and in reason, be set off against the claim for damages.

It has frequently been assumed, I think erroneously, that the case of *Great Western R. W. Co. v. Baby*, 12 U. C. R. 106, settles the point that under the Railway Act general benefits were to be set off against a special claim for damage, but on examination it will be found, I think, to be no authority for that position.

That was a motion to set aside an award under the Acts for the construction of the Great Western Railway, under which the majority of the arbitrators had awarded the enormous sum of £10,487 10s. for about an acre and one-third of land, which but for the existence of the railway would have been dear at a very small fractional part of that sum, and the Chief Justice remarked that if the effect of the railway had been to make that minute portion of land worth £10,000 and upwards, it must surely have added immensely to the value of the adjacent property, and he then refers to the immense and almost incredible value of this small piece as being almost conclusive of an increase of a similar kind to the residue of the property which manifestly had not been taken into account.

The award was set aside because, in the language of the Court, it was outrageous, but the judgment affords no warrant for the position for which it is sometimes cited that the Court held that general benefits were to be set off; on the contrary, the language of the Chief Justice leads rather, I think, to the opposite conclusion.

"We cannot expect," he says (at p. 120), "it to be so literally and stringently carried into effect, as that the lands taken shall not in general be valued somewhat more highly than they would have been if there had been no railway, because it is hard to distinguish nicely how much of the general improvement in the price of lands may be attributed to

that cause ; but in this case before us, * * the arbitrators seem to have thought it just to make the company pay according to a valuation which would have been altogether *imaginary* and *fictitious* if it were not for the effect of what the company have done or are doing *on the particular land* taken, or in its immediate vicinity."

Judgment.
BURTON,
J. A.

As I have said the award was set aside as being so extravagant as to establish *legal misconduct* on the part of the arbitrators, and the remarks of the Chief Justice, which although *obiter* are entitled to the greatest respect, lead, I think, to this conclusion, that if the value of the land had risen so enormously it must have been in consequence of some *special benefit* it derived from the railway, and that the adjacent lands were presumably also *speciallly benefited*, and that such special benefits had necessarily to be taken into account in awarding compensation to the owner for the portion taken.

In the case of *In re Ontario & Quebec R. W. Co. and Taylor*, 6 O. R. 338, the chief point in question was as to the effect of the notice to arbitrate, which was confined to the value of the land taken ; whereas the arbitrators had included in their award compensation for other matters which were not included in the reference. I do not at all disagree with the rule enunciated by Chief Justice Cameron in that case, as to the mode of ascertaining the compensation where a portion only of a lot is taken.

Mr. Justice Proudfoot, in *In re Credit Valley R. W. Co. and Spragge*, 24 Gr. 231, seems, I think, to construe Sir John Robinson's language as referring to general benefits. I do not so construe it, and I think I am safe in saying that there has been no case in which that question has been formally adjudicated upon after argument, and indeed the questions as arising under the Railway Acts were not generally of sufficient importance to call for judicial investigation.

It is brought much more prominently into notice in cases where the person suffering the injury has also been assessed, not only for the improvement, but for the very injury of which she complains.

Judgment.

BURTON,
J.A.

In the American case (*Palmer Co. v. Ferrill*, 17 Pick. 58), to which I have referred, the Court held that the benefits must be special and referable to the same cause, and that case was referred to approvingly in a subsequent case, *Jeffersonville, etc., R. W. Co. v. Esterle*, 14 Bush, 667, where this language was used: "So in this case, if the railway affords the appellee increased or additional facilities for ingress or egress to and from his house and lot, or for the movement of articles in which he may deal, or supplies which it is necessary he shall procure, this benefit may be taken into consideration in estimating the damages he has sustained. But *supposed benefits* arising from the increased general prosperity of the neighbourhood, and the enhanced vendible value of real estate in the particular locality, even if it be a recognized incident to the location of the public work, are too remote and contingent to be taken into consideration in the question of damages to appellee's houses and lot resulting from the special injuries to which he has been subjected. * * These benefits and advantages the appellee shares in common with persons owning lands near enough to be influenced by the general prosperity, and yet not upon the immediate line of the road, or not injuriously affected by the causes operating to his prejudice. And his right to be compensated for the special injuries he may sustain cannot be denied him because of the mediate and consequential benefits resulting to him in common with the local community at large."

The case of *Whitman v. Boston, etc., R. W. Co.*, 3 Allen, 133, when properly considered, supports, I think, the view that it is only special benefits, not benefits common to the whole public, which, under such a statute as this, are to be taken into consideration. The direction asked was:—"If the jury find that by reason of the filling up of the canal, and the location of the railway over a part of the petitioner's lot, the value of the rest of the lot was so enhanced that the same was afterwards worth more than the entire lot before the filling up, there was

no damage." Such was held to be a true view of the law, and it was not affected by the fact that other lots received a similar benefit; but that is a very different thing from a benefit in which the whole public participated.

Judgment.
BURTON,
J.A.

The learned Judge below, as I have said, is of opinion that if there is a hardship it is one for the Legislature to rectify. If the language of the statute is such as to compel such a construction I agree with him; but I have pointed out the anomaly of allowing persons who have suffered no injury to profit by these so called benefits, and depriving a person who has admittedly sustained damage of any compensation as a reason for not adopting such a construction. The one construction works no injury to any one, but is just and reasonable; the other operates most unjustly to the person who has sustained the injury.

I am of opinion therefore that the learned arbitrator was correct in refusing to allow any set-off of the alleged benefit in this case, consisting wholly of the speculative rise in the market value of the lands in which the whole public, those assessed and those not assessed, presumably share, and which have probably proved long ere this to be delusive and imaginary.

The appeal should, I think, be allowed.

Appeal dismissed without costs,
BURTON, J. A., *dissenting.*

ALLEN V. FURNESS.

Trusts and trustees—Will—Infant—Maintenance—“He who seeks equity must do equity”—Receiver.

Under a devise of land to a father “during his life, for the support and maintenance of himself and his (three) children, with remainder to the heirs of his body or to such of his children as he may devise the same to” there is no trust in favour of the children so as to give them a beneficial interest apart from and independently of their father, but the children being in needy circumstances will be entitled as against the father's execution creditor who has been appointed receiver of his interest to have a share of the income set apart for their maintenance and support, and in arriving at the share it is reasonable to divide the income into aliquot parts, thus giving one-fourth to the receiver. Judgment of Boyd, C., affirmed.

Statement.

THIS was an appeal by the defendant Furness from the judgment of BOYD, C.

The defendant was by an order made in an action of *McLean v. Allen*, appointed receiver of the share and interest of the plaintiff in the estate of the late Kate VanKoughnet, of Cornwall (see 14 P. R. 84, 291), and this action was brought for the construction of her will, the material paragraphs of which were as follows:—

Fifthly.—The share of the estate given and devised by my late father to my late brother J. Colborne VanKoughnet, which share has been declared by the order of the Court of Chancery, bearing date the twenty-second day of April, one thousand eight hundred and seventy-eight, made in the VanKoughnet settled estates, to belong to me as residuary legatee, I give and bequeath to my sister-in-law, Ann Martha VanKoughnet, widow of my said brother, J. Colborne VanKoughnet, in trust, to maintain and support herself and such of her children as she may deem fit, and after her death I give and devise such share to her four children now living.

Sixthly.—In the event of my sister, Harriet Louisa Allen, surviving me, I give and devise to her my one-seventh interest in the estate of my late father, Philip VanKoughnet, to be used by her during the term of her natural life, and after her death, or in the event of her

dying before me, I give and devise such interest to my nephew, Edwin Allen, during his life for the support and maintenance of himself and his children, with remainder to the heirs of his body, or to such of his children as he may devise the same to, or in the event of my nephew, Edward Allen, dying before me I will and devise said one-seventh interest in my father's estate to the children of the said Edwin Allen, share and share alike. Statement.

Harriet Louisa Allen, referred to in the sixth paragraph of the will, predeceased the testatrix.

It was contended that the plaintiff, Edwin Allen, was entitled, under the will in question, for his own use and benefit, to an estate tail in the one-seventh share referred to in the sixth paragraph, or at all events to an absolute estate during his own life in that share.

The action was tried at the Cornwall Chancery Sittings, on the 13th of November, 1891, before BOYD, C. It was proved that the plaintiff had an income of \$800 a year as a customs officer in Algoma; that he had three children, and that he could not maintain them; that the share in question consisted of real and personal estate, and that the income therefrom would be about \$450 per annum.

The learned Chancellor, on the 24th of November, 1891, delivered the following judgment:—

Assuming that no trust is created by the words of the will whereby the property is devised to the plaintiff during his life, "for the support and maintenance of himself and his children," it would follow that the yearly income would be paid to the plaintiff by the VanKoughnet estate for the support and maintenance of himself and his children, and in case any child was not maintained an application might be made to the Court as stated by Kindersley, V. C., in *In re Robertson's Trust*, 6 W. R. 405, cited for the defendant, and that no trust is created which the law can enforce, according to the present state of decision, is, I think, manifest from a review of the cases cited and others

Judgment. referred to in *Bank of Montreal v. Bower*, 18 O. R. 226.
BOYD, C. This is the rule of the Courts as between parents and children, the Court not undertaking to execute any trust, but acting on the assumption that the children will be supported out of the fund or income by the parent.

But what is to be the attitude of the Court when equitable execution is sought out of such property by the creditors of the parent so absolutely entitled?

Is the Court to let the creditors take the whole on the ground that the parent could apply the whole to his own use? The Court would then act with the knowledge that the children would not receive any support thereout and would then be asked to facilitate a result which would frustrate the expectations of the donor or testator. But he who comes into equity must do equity. The bestowment on creditors would be an injustice to the children if the fund was needed for their proper maintenance. Such seems, on the evidence, to be the present case: the salary of the father, plus the yearly income from the fund in question, will all be needed in order to reasonably provide for himself and them.

The judges in England have cleared up the meaning of awarding what is called "equitable execution" by the appointment of a receiver as in this case. The appointment of a receiver in aid of a judgment at law is not "execution," but it is equitable relief granted under circumstances which make it right that legal difficulties should be removed out of the creditors' way, and it ought not to be obtained without shewing the existence of the circumstances creating the equity on which alone the jurisdiction rests: per Fry, L. J., in *In re Shephurd, Atkins v. Shephard*, 43 Ch. D. 131.

Having regard to the maxim that "equality is equity," and that much expense would be incurred upon a reference to apportion the not very large income, I now fix the sum to which the receiver is entitled as upon an equal division between the father and each of the children, so that one-fourth will go to the payment of his debts, and three-

fourths for the support and maintenance of the children as long as required for this purpose. Such an equal apportionment was made in *Jubber v. Jubber*, 9 Sim. 503, and in *Rippon v. Norton*, 2 Beav. 63, though the propriety of dividing into aliquot parts at all was as directed in the latter case questioned in *In re Coleman*, *Henry v. Strong*, 39 Ch. D. 443, upon grounds not applicable here.

Judgment.

BOYD, C.

The shares going to the infants should not be burdened with any of the costs. These should all come out of the portion payable to the receiver. The case from its novelty and otherwise seems to be a proper one for all costs to be paid out of this part of the estate.

I give judgment upon the argument before me, rather than upon the frame of the pleadings; but I give leave to every one to amend, as advised.

The defendant appealed, and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 21st of October, 1892.

Marsh, Q.C., and *C. D. Scott*, for the appellant. The learned Chancellor has held that there is no trust in favour of the children, and we rely on his judgment on that point. The distinction between the wording of the two clauses is also of value in deciding this question. He has also held that the plaintiff has merely a life interest, and that the children are entitled on equitable principles to have three-fourths of the income set apart for their benefit. In this, we submit, he is wrong. The true effect of the will is to give to the plaintiff an estate tail. It is clear that this would be the result if the devise were one of realty only, and if the devise in question is one of mixed property, the same rule should apply: *Elphinstone on the Interpretation of Deeds*, rule 96, p. 260; while, if it were a gift of pure personalty, there would clearly be an absolute title. The power to devise to his children does not in any way limit or cut down the estate conferred. Similar words were held to have no effect at all in *Trust & Loan Co. v.*

Argument. *Fraser*, 18 Gr. 19, and to the same effect is *Howorth v. Dewell*, 29 Beav. 18. The sole question that can be considered on this appeal is the extent of the plaintiff's interest. The receivership order settles all other questions, and it is not proper to treat the application, as the Chancellor has done, as if it were an original application for equitable execution. The receiving order gives the right, and the only thing to determine is the bare legal point. The costs of the action should have been paid out of the whole seventh, and not out of the plaintiff's one-fourth share.

Leitch, Q.C., for the adult respondent. The devise comprises not merely real estate, but personalty as well, and the rules as to estates tail do not apply. The superadded words are moreover inconsistent with the conferring of an estate tail and interpret the meaning of the devise shewing clearly that the intention is to benefit the children. Here there is at the least an implied trust or equity for the benefit of the children, which they might enforce by application to the Court: *In re Robertson's Trust*, 6 W. R. 405; and it being clear on the evidence that the children require the fund for their support the Court will not now, on an adverse application, put it in such a position as to make it impossible for the children to have recourse to it. But the language of the will is strong enough to create an absolute trust in favour of the children. The cases where the contrary has been held are all distinguishable. *Bank of Montreal v. Bower*, 18 O. R. 226, has merely the expression "wish and desire" following an absolute devise, and the cases it follows, such as *In re Diggles*, *Gregory v Edmondson*, 39 Ch. D. 253, and *In re Adams and Kensington Vestry*, 27 Ch. D. 394, all have the same kind of mere precatory words. Here there is no mere expression of desire. There is a definite purpose set out on the face of the will.

E. D. Armour, Q.C., for the infant respondents. Under the devise in question the children are entitled to have the whole income set apart for their maintenance if necessary. The plaintiff is earning enough to keep himself, and should

not use any portion of the income, and it is proper on Argument equitable grounds not only to allow three-fourths, but the whole of the income to the children, and the cases cited in the judgment below entirely support the conclusion arrived at. It is submitted, however, that the learned Chancellor should have gone further, and that he was wrong in holding that there is no trust here. In arriving at the conclusion whether certain words do or do not constitute a trust it is necessary to distinguish between the person for whose benefit the gift is made and the motive for making it. If there is a mere expression of motive there is no trust, but if, as here, persons are clearly pointed out as the object of the gift, then a trust arises. So far from the fifth clause being stronger than the sixth it is not so strong in favour of the children. The words "in trust" are subject to the discretionary power given by the words "as she may deem fit" while in the sixth clause there is the absolute gift for the children without any discretion: *Crockett v. Crockett*, 1 Ha. 451; 5 Ha. 326, 2 Ph. 553; *Raikes v. Ward*, 1 Ha. 445; *Jubber v. Jubber*, 9 Sim. 503; *Newill v. Newill*, L. R. 7 Ch. 253. The cases in which it has been held there was no trust are all distinguishable. In *Lambe v. Eames*, L. R. 6 Ch. 597, there was a clear discretionary right. In *Stead v. Mellor*, 5 Ch. D. 225, the motive merely was expressed, and so in the other cases of *In re Hutchinson and Tennant*, 8 Ch. D. 540; *In re Adams and Kensington Vestry*, 27 Ch. D. 394; *In re Diggles*, *Gregory v. Edmondson*, 39 Ch. D. 253; *Mussoorie Bank v. Raynor*, 7 App. Cas. 321. The test is whether the testator himself directs the course the property is to take or leaves it to another to direct the disposition of it. If the devise were limited to Allen and his children without more that would give them all equal shares. The effect of adding the words of remainder is to make the devise to four with remainder to three. The expression "the heirs of the body" has been interpreted by the testatrix herself to mean "children," so that the devise is really a devise to the father and children for their joint benefit during

Argument the father's life and after his death to the three children absolutely, subject to the power given to the father to give the whole to one or other of the children; and there is no room for the application of the doctrine of *Shelley's Case*. Apart from the strict legal construction it is clear that the intention of the will is to benefit the children, and by analogy to the doctrine of a wife's equity to a settlement the children should be provided for as against the defendant who is compelled to resort to equity for aid. The judgment is right in making the costs payable out of the share given to the father: *Basevi v. Serra*, 14 Ves. 313; *Brace v. Ormond*, 2 J. & W. 435.

Marsh, Q. C., in reply. There is no analogy here to the doctrine of a wife's equity to a settlement. One clear distinction is that there is no legal obligation to support the children, but there is a legal obligation to furnish support to a wife. That doctrine moreover is only applied when the husband has to resort to equity to get possession of the property in question, and though as an appendage to the wife's right provisions for the benefit of the children were gradually introduced, such provisions were never introduced without the basis of the wife's right. *In re Robertson's Trust*, 6 W. R. 405, is just in line with other old cases which are not now law. The current of modern authority runs the other way and at any rate the statements invoked from that case are mere dicta. The cases that the respondents attempt to distinguish really shew that it is almost impossible to use precatory words strong enough to create a trust. See, in addition to those already cited, *Benson v. Whittam*, 5 Sim. 22; *Mackett v. Mackett*, L. R. 14 Eq. 49; *Farr v. Hennis*, 44 L. T. N. S. 202.

December 24th, 1892. The judgment of the Court was delivered by

MACLENNAN, J.A. :—

I think the action is irregular in form. The action should have been by the creditor McLean, as plaintiff,

against Allen and his children, and the receiver ought not to have been a party at all. Or, if brought by Allen as plaintiff, the creditor and the children should have been the defendants. The case having, however, come to this Court in its present shape without objection, I think we must deal with it as it stands.

Judgment.
 MAOLENNAN,
 J.A.

As to the merits of the appeal, the first question is whether the will of Miss VanKoughnet creates a trust in favour of the infant defendants, so as to give them a beneficial interest apart from and independently of their father, and I am of opinion that it does not.

In *In re Robertson's Trust*, 6 W. R. 405, cited by the learned Chancellor, and decided by an eminent Equity Judge, Sir R. Kindersley, in the year 1858, the gift was almost identical with the present one. The bequest was: "I bequeath to my nephew, John Robertson, the sum of £7,000 for the maintenance and support of himself and his family." The Vice-Chancellor said he had not the smallest doubt that the testator intended the legacy to be paid to the legatee, taking it for granted he would maintain and support his family thereout; that he did not mean to express any trust, and therefore there should be a direction that the money should be paid out to the legatee, in the words of the will, namely: "for the maintenance and support of himself and his family." He added, however, that the only effect would be that in case any child was not maintained, he might apply to the Court.

In *Lambe v. Eames*, L. R. 6 Ch. 597, the words of a gift to the testator's widow were, "to be at her disposal in any way she may think best, for the benefit of herself and family," and the Court of Appeal, affirming Malins. V.-C., held there was no trust, and that a devise by the widow passed the property. I am unable to distinguish this case from that before us. The words, "to be at her disposal in any way she may think best," which were contained in that devise, but not in the present one, can I think make no difference, for they add nothing to the effect of a simple

Judgment. gift, and the remaining words are in substance the same
MACLENNAN, as the present, for family means children.
J.A.

This case was followed with approval by Jessel, M. R., in *In re Hutchinson and Tennant*, 8 Ch. D. 540; and afterwards by the Court of Appeal in *In re Adams and Kensington Vestry*, 27 Ch. D. 394. It is also cited without question by Lord Hobhouse in delivering the judgment of the Judicial Committee in *Mussoorie Bank v. Raynor*, 7 App. Cas. 321.

I think, therefore, the learned Chancellor was right in holding that there was no trust in favour of the children in this devise.

The other important question in the appeal is whether the judgment is right in refusing to give the plaintiff the whole of the income in question, and in directing part of it to be applied to the support and maintenance of the infants. On this point, also, I think the judgment is right, and for the reasons given by the learned Chancellor.

The present action is in reality a proceeding by the creditor to obtain payment of his debt. He found difficulties in his way of getting payment by ordinary legal process, and therefore applied for and obtained the appointment of a receiver. He invokes the equitable jurisdiction of the court, and asks for equitable relief, which the appointment of a receiver is shewn to be by Fry, L. J., in *In re Shephard, Atkins v. Shephard*, 43 Ch. D. 131, cited by the learned Chancellor. That being so, he can only have relief on equitable principles, one of which is that he who comes into equity must do equity. I think it is clear that if this legatee, Allen, were to apply to the Court on equitable grounds to have this income paid to him, and if it appeared that he had cast his children off, and was neglecting to support and maintain them, the Court would withhold its aid, except upon the terms of his doing what the testatrix intended and expected him to do with her bounty. The language of Kindersley, V.-C., in *In re Robertson's Trust*, above mentioned, that if any child was not maintained he might apply to the Court, shewed that learned Judge was

of opinion that the Court would interfere actively in favour of an infant in such a case, even after the fund had been paid over to the legatee. But whether that would be so or not, I think it clear that the Court ought to refuse to pay the fund to the legatee if it sees that he has disregarded and intends to disregard the purpose for which the gift was made.

Judgment.
MACLENNAN,
J.A.

If that is so, the case must be the same against a creditor as against the legatee. The latter can stand no higher than the former, the equity is as strong against the one as the other.

I think the present case is analogous to that of a wife's equity to a settlement, which is an instance and illustration of the maxim that he who seeks equity must do equity: *Murray v. Lord Elbank*, 1 W. & T. L. C., 6th ed., 501.

It is shewn that the plaintiff is a customs officer in Algoma, with an income of \$800 a year, and that the income in question is necessary for the support and maintenance of his children, it not being shewn that either the plaintiff or his children have any other fortune or income. That being so I do not see that the learned Chancellor has erred in the proportion which he thinks ought to be withheld from the creditor, for the support and maintenance of the plaintiff's children, or that his judgment ought to be interfered with on the question of costs.

I think the appeal should be dismissed.

Appeal dismissed with costs.

HILL V. ASHBRIDGE.

Limitation of actions—Tenants in common—Right of entry—R. S. O. ch. 111.

Where there are several tenants in common of land, of whom all but one are in possession, and before the ten years have run the latter acquires another undivided share from or under one of those in possession, the Statute of Limitations runs as to both shares from the time the last one was acquired.

Judgment of MEREDITH, J., reversed.

Statement.

THIS was an appeal from the judgment of MEREDITH, J.

The action was brought for the partition of two parcels of land, and the defendant contended that he had obtained a title under the Statute of Limitations to the shares of the plaintiffs. The first parcel in question was known as the homestead, and as to it the chain of title was as follows:—

One George Ashbridge was the owner of this parcel, and died intestate and in possession on the 31st of December, 1879, leaving him surviving, as his sole heirs at law, three brothers and a married sister. The sister died intestate on the 27th of January, 1884, her husband having predeceased her, and the plaintiffs were her children and sole heirs at law. Samuel Ashbridge and John Ashbridge, two of the brothers, died intestate and without issue, respectively on the 6th of February, 1886, and the 8th of April, 1888, and Levi Ashbridge, the third brother, was the defendant. On the death of George Ashbridge, Levi and his brother John took possession of the homestead and remained in possession together until the death of John, and then Levi remained in sole possession. Neither Samuel, nor the mother of the plaintiffs, nor her husband, nor any of the plaintiffs, was ever in possession.

As to the second parcel, containing about thirty-two acres of land, the chain of title was somewhat different, but it is unnecessary to set out the facts in connection with that parcel, as the decision, except in so far as it was governed by the ruling of law as to the first parcel, depended upon the evidence as to possession.

The action was commenced on the 4th of February, 1890, and came on for trial at Toronto on the 28th of November, 1890, before MEREDITH, J., who, after reserving judgment, decided in favour of the defendant. Statement.

The plaintiffs appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 16th and 17th of May, 1892.

W. Macdonald, and *R. A. Grant*, for the appellants. It is admitted that apart from the Statute of Limitations the plaintiffs are entitled to an undivided half interest in the homestead. The learned Judge held that by reason of the statute the plaintiffs are barred of the shares that devolved on them by the deaths of their uncles George and Samuel, and are entitled only to the one-sixth portion which devolved upon them upon the death of their uncle John. This we submit is an erroneous conclusion. Unless the plaintiffs are barred entirely they are not barred at all: *Baldwin v. Kingstone*, 18 A. R. 63. The plaintiffs being tenants in common of the whole property, their right of entry to a portion enures to their benefit in respect of their whole interest, and the statute therefore only runs against them from the time of the death of John.

G. T. Blackstock, and *R. McKay*, for the respondent. The different shares must be treated as distinct entities, and the plaintiffs and their mother not having been in possession of the shares which devolved upon the mother at the death of George, and the defendant having been in possession of the whole land, and therefore of that share, for more than ten years before the beginning of the action, has obtained an absolute title to that share. The same reasoning applies to the share that devolved upon the plaintiffs upon the death of their uncle Samuel: *In re Hobbs*, *Hobbs v. Wade*, 36 Ch. D. 553.

W. Macdonald, in reply.

December 24th, 1892. MACLENNAN, J. A.:—

The action was brought on the 4th of February, 1890, more than ten years after the death of George. In the

Judgment.
MACLENNAN,
J.A.

events which have happened it is clear that the plaintiffs are entitled to an undivided half share in this parcel, unless barred in whole or in part by the Statute of Limitations, which has been pleaded by the defendant. The learned Judge has decided that the defendants are barred, except as to a one-sixth share, being an undivided half of the one-third share of John, who died in possession in 1888. The learned Judge treats the different shares as if they were separate and distinct properties, and he holds the plaintiffs barred as to the one-fourth share of their mother, because she and they were out of possession for more than the statutory period. He also holds them barred of their one-third of Samuel's one-fourth, because Samuel had not been in possession either. As to their one-half of John's share, however, he held them entitled to recover, because John died in possession in 1888. No authority appears to have been cited to the learned Judge, and he merely states that in his opinion the statute having once begun to run against Mrs. Hill's and Samuel's shares in favour of the defendant, the latter acquired a title at the end of ten years.

There seems to be no express authority on this interesting point. The only case which was cited to us by Mr. Blackstock, the respondent's counsel, was *In re Hobbs, Hobbs v. Wade*, 36 Ch. D. 553. That case, however, does not decide the point. The share which was there held to be barred was Samuel's one-eighth share, and Samuel did not become entitled to his brother John's one-eighth, until after his own one-eighth had been barred. The present case would have been like *In re Hobbs*, if the ten years had run before the death of John. I have not myself found any authority upon the point, and we must, therefore, decide it upon principle.

It is clear that until the ten years had run the defendant had acquired no right or title against his co-tenants; and until the last hour of the ten years, the title of the plaintiffs was just as good and as unquestionable in law as that of the defendant. Therefore, when Samuel died, the

plaintiffs became the undoubted owners of one-third ; and when John died, their title became an undivided half, the defendant having the other undivided half. Now when Samuel died, the plaintiffs' right of entry became a right for one-third instead of a fourth ; and when John died, it became a right of entry for a-half, instead of a-third. I do not see how it could be regarded not as one right of entry for the half, but as two rights, one for a-third and another for a-sixth. The two shares coalesced and merged, and from that time the plaintiffs' title was to an undivided and indivisible half. Unquestionably from that time the plaintiffs might have sued not for a-third but for a-half ; and I think that must be regarded as a new and different right of entry from what they had before. John's death having occurred within ten years, the plaintiffs get a new right of entry at his death, which as to the one-sixth then first accrued. It was different at the death of Samuel, for while a new right of entry then accrued to the plaintiffs for the share inherited from Samuel, a right of entry had accrued to Samuel himself in respect of that same share at George's death ; and therefore the right of entry for the whole first accrued not to the plaintiffs but to those from whom they claimed ; and therefore in that case time would have to be computed as to the whole from the death of George. I think, therefore, with great respect, that the plaintiffs' right to bring this action first accrued to them at the death of John, and that this title is single and not severable into parts ; and that they are entitled to recover their full undivided half share.

[The learned Judge then dealt fully with the other parcel, coming to the conclusion that on the evidence the defence failed.]

BURTON, J. A. :—

This case involves some nice questions, but on the best consideration I have been able to give to it, I have come to the same conclusion as my brother MacLennan.

Judgment.

MACLENNAN,
J. A.

Judgment.

BURTON,
J.A.

I may state my views shortly:— On the death of Samuel, his interest became divisible between the defendant, John, and Mrs. Hill, but although the statute had not then run, Mrs. Hill's title, claiming as she did through Samuel, could be no higher than his ; and her right to bring an action was the same as his, and must be deemed to have first accrued on the 31st of December, 1879.

At the time of John's death the statute had not then run, but each of the sons, Levi and John, was entitled to one-third, and Mrs. Hill to one-third.

On John's death, one-half of his interest descended to the defendant, and the other half to Mrs. Hill, whose right to bring an action then for the first time accrued in respect of that interest ; she was then entitled to an undivided half in the estate, and as her right to bring an action in respect of the interest derived through John gave a new starting-point, she, or the plaintiffs claiming through her, must necessarily be entitled to bring an action at any time within ten years from his death, in which the recovery must be not merely for the one-sixth, but for the entire estate to which the mother was entitled at the time of John's death.

As to the thirty-two acres, I agree in thinking that the evidence of possession is not sufficient to bar the plaintiffs' claim. I am of opinion that the occasional receipt of the small sums of rent was not a receipt of rents and profits within the meaning of the statute, even if the receipt of such rents and profits would *per se* be sufficient under the facts in this case to bar the plaintiffs.

I agree therefore in thinking that we should allow this appeal.

HAGARTY, C. J. O., and OSLER, J. A., concurred.

Appeal allowed with costs.

CONNELL V. TOWN OF PRESCOTT.

Negligence—Contributory negligence—Damages—Remoteness—Voluntary incurring of danger.

Where a man, acting as a reasonable man would ordinarily do under the circumstances, voluntarily places himself in a position of danger in the hope of saving his property from probable injury and of preventing probable injury to the life or property of others, and sustains hurt, the person whose negligent act has brought about the dangerous situation is responsible in damages.

Anderson v. Northern R. W. Co., 25 C. P. 301, distinguished and questioned.

Judgment of *BOYD, C.*, in the Divisional Court, and of *STREET, J.*, at the trial affirmed, *BURTON, J. A.*, dissenting.

THIS was an appeal by the defendants from the judgment of the Chancery Division. Statement.

The action was brought to recover damages for injuries caused to the plaintiff by the alleged negligence of the defendants. The plaintiff, a farmer, on the 11th of October, 1890, drove a team of horses attached to a lumber waggon to Prescott, and went into the lumber yard of one Elliott, situated on the south side of Wood street. There he left his horses in charge of a man named Bennett, who had previously driven into the same yard with another team of horses attached to a lumber waggon. While both teams were standing in charge of Bennett under a roofed in space at one end of the yard, a blast was set off by the defendants' workmen who were excavating a drain on Wood street, without warning to the plaintiff or Bennett, who could not, however, be seen from the place where the work was being done, and at the report the horses became excited. Bennett had them, however, almost under control again, when a shower of stones from the blast came down upon the roof of the shed, and the plaintiff's horses immediately started away, frightening and starting off Bennett's team also. The plaintiff was standing some little distance from the horses in such a position that there was no danger whatever of his being in any way hurt either by the stones or by the horses, but when he saw that the horses

Judgment. nothing; was it an unwise thing to do as he did? The jury affirm his conduct, and was it not a matter to be submitted to them? In *The Rona*, 51 L. T. N. S., at p. 32, Field, J., says: "If a wrongdoer puts you in a position of danger, so that you are called upon hastily to take some steps, and you do happen then to take the wrong course, there you are excused as against the wrongdoer."

BOYD, C.

The action of the plaintiff was not of that independent and deliberate character which would indicate an election of that course with all its risks. This element differs the case from *Anderson v. Northern R. W. Co.*, 25 C. P. 301, which, however, can hardly be regarded as a case that should now be followed. In circumstances the same almost as those of the *Anderson Case*, it was held in a late case in Scotland that the whole matter as to contributory negligence was for the jury: *Woods v. Caledonian R. W. Co.*, 23 Sc. L. R. 798 (1886).

Besides this Scottish case I find a consensus of American authority against the doctrine of the *Anderson Case*, and supporting the act of the plaintiff as justifiable: *Eckert v. Long Island R. W. Co.*, 43 N. Y. 502; approved in *Linnehan v. Sampson*, 126 Mass. 506; *Donahoe v. Wabash, etc. R. W. Co.*, 53 Am. R. 594; *Wasmer v. Delaware, etc. R. W. Co.*, 80 N. Y. 212; *Rexter v. Starin*, 73 N. Y. 601; *Cottrill v. Chicago, etc. R. W. Co.*, 47 Wis. 734; *Twomley v. Central Park, etc. R. W. Co.*, 25 Am. R. 162.

It was laid down in 73 N. Y. 601, that it is the duty, as well as the right, of a person whose property is endangered by the negligence of another, to do what he reasonably can to save and protect it; he cannot stand still and omit such care as he can reasonably and prudently take, and thus suffer a loss and cast it upon another. If therefore while exercising such care he is injured, the person guilty of the negligence is liable.

Most of the cases are collected in a decision of 1890: *Liming v. Illinois Central R. W. Co.*, 47 N. W. R. 66.

Other points may also be considered in support of the verdict.

The horses were the property of the plaintiff, and it was his duty to take such care of them as that they should do no harm. It was quite possible for him to save them from running away, and if he failed to make the attempt it would be urged that he alone should suffer if they were killed, and that he should answer for it if they ran down a foot passenger or did other damage in their flight.

Altogether I am against disturbing the result, and would affirm the judgment with costs.

Judgment.

Boyd, C.

MEREDITH, J. :—

The jury in effect found that there was not contributory negligence on the part of the plaintiff; that neither the act of leaving the team as he left it, nor endeavouring to stop the horses after they had started, was an act of negligence upon his part; and one may well agree as to the latter; and both were essentially questions for the jury.

One can hardly look upon a reasonable effort—though necessarily attended with danger—of an owner of horses even in the situation of the plaintiff, to stop them when running away, as a negligent or unwise act; not only his own natural feelings for his animals, and his pecuniary interests, may well dictate it, but the safety of other beings, generally endangered by runaway teams, may fairly demand it. Indeed it might well be considered negligence in many cases if no such effort were made.

It may fairly be said that the plaintiff's conduct was humane and courageous.

But it does not follow that in law he was justified in taking the risk at the expense of the defendants, whose negligence caused the horses to run away.

The well-known maxim *Volenti non fit injuria* prevails and prevents recovery in cases where not only has there been no contributory negligence, but the knowledge of the danger has caused perhaps the exercise of more than ordinary care.

I fear that that doctrine prevents the plaintiff recovering

Judgment. in this action ; that there is no help for it ; that this case is concluded by expositions of the law in cases in our own Courts binding upon us sitting here, though they be cases which have provoked observations upon the unwisdom and inhumanity of such law : See *Anderson v. Northern R. W. Co.*, 25 C. P. 301, and *Hay v. Great Western R. W. Co.*, 37 U. C. R. 456.

The jury have found that the plaintiff exposed himself to danger in trying to save his property. It is obvious that he was quite removed from any danger whatever to him, and that he voluntarily went out and incurred a great risk ; this was frankly admitted by and for him.

In his testimony at the trial he puts it thus :

"In going to assist Bennett did you stop to think before you started ? I did not stop to think nothing, only to stop my team ; when I saw them start, I ran to hold them, expecting to aid Bennett.

Did you take time to stop and consider ? Oh ! no ; if I had stopped to consider, I could not have done anything.

Then you did not reflect on the possibility of danger ? No.

It was because you did not want to trust this young horse you got Bennett to hold him by the head ? No.

Why did you get him to hold him by the head ? I would not let my team stand any where.

Did you ask Bennett to hold him by the head ? No.

Was it because blasting was going on you took the precaution to ask him to hold it by the head ? I knew nothing of the blasting.

Was it after the horses commenced to run you started ? Certainly, as soon as they started to run I started.

Had Bennett let go of the horse when you started ? No.

He was holding on to your horse ? Yes.

Your idea then was to run up, to try and stop the horses from running away ? To aid Bennett in stopping them from running away.

Were they coming on very fast ? Very fast, faster than I thought at the time.

You knew at that time that the lane was not wide enough for two teams of horses to pass along, and you escape injury? I did not know anything about it; I did not think anything about it. Judgment.

You could see that was so? I could not see anything about it; I had not time to think.

How far did you run up toward the horses? That I cannot say.

When you saw the horses coming near, you turned around to get away? When I saw Bennett thrown down, I knew it was no use, and I turned to get out of the way.

Didn't you know, if two teams were running there, it would be utterly useless for you to try and stop them? No, I did not think anything about it; I always had a good deal of luck in stopping runaway horses, but I did not stop them that time.

And after you had started, didn't it occur to you at once it was a very dangerous thing for you to try and stop them? I suppose it might be.

Then of course your first idea was not to protect yourself but to catch the horses? That is the first idea.

Of course if you had not started to try and stop the horses, you would have been perfectly safe? If I had remained where I was, under the shed, I would have been perfectly safe."

I am not prepared to say that his act was by any means a reckless one; as it has turned out it was a most unfortunate one, a very disastrous one; but in the majority of cases such efforts well executed may doubtless be successful, saving not only the horses but sometimes human life, generally more or less endangered by such a runaway as this.

But the question is, at whose cost must the risk be run? It seems to me that in this case it could not be at the defendants'.

The plaintiff being guilty of no negligence, there could be no criminal or civil responsibility upon him for any

Judgment. injury the runaway team might have done; the defendants' negligence would have made them no doubt civilly answerable for such injury, as well as for any damage to the team.

I am unable to perceive any duty or right in law, in the circumstances of this case, upon or in the plaintiff to take the risk he did, except the right to take it with the benefit or injury that might come from it.

Nothing was gained by either party by the act; the team spent out their fright at the defendants' risk; the defendants were not lightened of any responsibility for their negligent act.

But it is said there is a rule which permits what was done by the plaintiff without losing the right to recover against the original wrongdoer. It is obvious, however, that the rule invoked does not apply here, for the plaintiff was not in imminent peril, he had not to choose between different ways of obviating or escaping such danger; he was in perfect safety, and voluntarily put himself in imminent peril and was injured.

Wilton v. Northern R. W. Co., 5 O. R. 490, to which we were referred by Mr. Hutcheson in his clear and well prepared argument, is plainly distinguishable; there the plaintiff was in imminent danger; he was in the sleigh driving the oxen, and was upon the track with the swift running train close upon them; and there was evidence that if he had not jumped off as he did, both he and the oxen might have been killed; the oxen escaped and he was injured only. Besides there was the question of damage to the train if he had left the oxen on the track and made an effort to save himself only. The question was one of contributory negligence.

Had the plaintiff here been driving or holding his horses, different questions would have presented themselves.

There was here no act of negligence on the part of the defendants after the plaintiff took the risk, nor any continuance of a negligent act begun before; so that it cannot be said even that the plaintiff took the risk upon the faith

of the defendants doing any duty or of abstaining from Judgment. doing anything contrary to any duty, in which they failed MEREDITH, J. and so increased his real or estimated danger.

And the direct cause of the injury was the plaintiff's own horses, not a locomotive engine driven against them or him.

Nor is the case like any of those in which it was found that there was an invitation by the defendants to the plaintiff to do that which he did, or in which it was found that the plaintiff acted without full knowledge of the nature and extent of the danger in using ways provided by the defendants, or in which being in the service of the defendants, he had been in obedience to their orders exposed to danger.

In my opinion, the plaintiff was the author of his own injury, the proximate cause was his voluntary act in endeavouring to stop his runaway team, and in law he has therefore no claim upon the defendants in respect of the personal injuries he has sustained, and I would therefore allow this motion, and, upon the admitted facts, dismiss the action.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 16th of November, 1892.

W. R. Meredith, Q. C., for the appellants. In discussing this case it is important to keep in view the distinction that exists between the right of recovery where injuries result from wrong doing, and where injuries result from negligence merely. In the latter case the right of recovery is much more limited: Addison on Torts, 6th ed., p. 40. There was not in fact in this case any negligence shewn, at all events no negligence of which the plaintiff can legally complain. The plaintiff was not on the highway, and the defendants' servants had no knowledge of his whereabouts, and had no reason to expect that there was any possibility of injury to any one: *Tolhausen v. Davies*, 57 L. J. Q. B. 392;

Argument.

59 L. T. N. S. 436. But assuming negligence it is admitted that the plaintiff did not himself incur any danger whatever by reason of the blast, and the accident resulted from his voluntarily rushing into danger. This being so, *Anderson v. Northern R. W. Co.*, 25 C. P. 301, which is still good law, governs the case. The cases cited by the learned Chancellor in the Court below do not determine that a person is entitled to take risks to save property merely. *Eckert v. Long Island R. W. Co.*, 43 N. Y. 502, is one of them, and in that case the distinction is drawn between efforts to save property, and efforts to save life, the case itself turning on the fact that there was there an effort to save life. *Linnehan v. Sampson*, 126 Mass. 506, proceeds on the same principle of effort to save life, and this is also the governing principle of *Donahoe v. Wabash, etc., R. W. Co.*, 53 Am. R. 594. *Cottrill v. Chicago, etc., R. W. Co.*, 47 Wis. 734, does not touch the question now in issue at all. That case deals with the effect of choosing a wrong course where a person in a position of danger has to make a choice. *Rexter v. Starin*, 73 N. Y. 601, is nearer the present case, but is distinguishable. There the plaintiff was injured in endeavouring to prevent a collision between two canal boats, and he was held to have acted in the performance of a duty. In that case there was certain to be great loss of property, and almost certain loss of life, if the collision occurred. Here there was not only no certainty of loss, either of life or property, but at best a mere probability of loss of property. *Cook v. Johnston*, 58 Mich. 437, upholds the doctrine now contended for, and it is there plainly laid down that a man is not entitled to voluntarily expose himself to obvious risk of injury merely to save property from the consequence of another's negligence. *Seale v. Gulf and Sante Fe R. W. Co.*, 65 Texas, 274, is also in the appellants' favour. Death in that case resulted from an attempt to put out a fire kindled by the negligent act of the defendants, and it was held that the injury was too remote. At the same time that the present case was before

the Chancery Division, the Queen's Bench Division had under consideration the case of *McKelvin v. City of London*, now reported, 22 O. R. 70, where a somewhat similar question was involved, and, relying on a case of *Page v. Bucksport*, 64 Me. 51, recovery was allowed. But *Page v. Bucksport* was distinguished in *Seale v. Gulf and Sante Fe R. W. Co.*, the distinction being that there was no obvious danger in doing what the plaintiff in *Page v. Bucksport* did. *Hay v. Great Western R. W. Co.*, 37 U. C. R. 456, is a case in our own Courts which is precisely the same in principle as the present case. There, after a railway accident, the plaintiff returned to a burning car to save some of his property, and was severely burnt, and he was nonsuited on the ground that he had voluntarily incurred an unnecessary danger. Apart from this question of the effect of the plaintiff's voluntarily incurring danger, there is the further answer to the claim that even if the plaintiff was entitled to endeavour to stop his horses, still the injury that has resulted cannot be said to have been the natural and probable result of the defendants' alleged negligence, and therefore the damages are, legally speaking, too remote to now be recovered against the defendants. The cases on the question of remoteness of damage are almost innumerable, and it is not necessary to refer to them in detail. See for example *Cox v. Burbidge*, 13 C. B. N. S. 430; *Lee v. Riley*, 18 C. B. N. S. 722; *Crowhurst v. Amersham Burial Board*, 6 Exch. D. 5; *Smith v. Green*, 1 C. P. D. 92; *Hobbs v. London and South-Western R. W. Co.*, L. R. 10 Q. B. 111; *McMahon v. Field*, 7 Q. B. D. 591. The governing principle is sufficiently clear, and it is that in order to entitle to recovery the result must be one that a reasonable man would regard as likely to happen as a consequence of the act in question. Assuming, however, that the damages are not, legally speaking, too remote, and that a man may, under some circumstances incur danger in endeavouring to save property, still we say that recovery should not be allowed in this case because here the effort was a hopeless one, and such an effort as should not have

Argument.

Argument. been made. There was plenty of time for deliberation, and the plaintiff should have seen that he was too late to do any good, and should not have interfered. It is true that where a person is suddenly put in a position of peril, and must instantly act, he is not bound, at the risk of not being able to recover damages, to take what is afterwards seen to be the best course; the leading case upon this point being *Jones v. Boyce*, 1 Starkie, 493. That rule is invoked here. But here there was time for thought, and besides the rule applies only where a choice has to be made of the course that shall be taken to free the person making the choice from imminent danger. Here the plaintiff, not to save himself or others, but at best to prevent a remotely possible injury to property, deliberately incurred an obvious risk, and the finding of the jury that he acted reasonably in so doing should be set aside. In any event the damages are excessive, and a new trial should be allowed on that ground.

J. B. Hutcheson, for the respondent. This was not in fact a case of unnecessarily rushing into danger to save property, but the injury was the result of the attempt by the plaintiff to save his friend from danger and to protect his own property, and in making this attempt he fulfilled an obvious and imperative duty. Much of the argument of the appellants therefore falls to the ground, for this was really an injury incurred in the reasonable attempt to save life. Even, however, if it is held to be merely an attempt to save property, then the appellants must still be held liable. The jury found that the plaintiff acted as a reasonable man would do under the circumstances, and it is peculiarly a question for the jury in a case of this kind as to the degree of caution that should be exercised. The case is within the principle of *Wilton v. Northern R. W. Co.*, 5 O. R. 490, and there are numerous other cases which in principle support the judgment. See, for example, in addition to the cases already cited, and attempted, unsuccessfully it is submitted, to be distinguished, *Carty v. City of London*, 18 O. R. 122; *Liming v. Illinois Central R.*

W. Co., 47 N. W. R. 66; *Stickney v. Maidstone*, 30 Vt. Argument. 738; *Pike v. Grand Trunk R. W. Co.*, 39 Fed. R. 255; *Grand Trunk R. W. Co. v. Ives*, 144 U. S. 408; *Woods v. Caledonian R. W. Co.*, 23 Sc. L. R. 798. The statements in *Eckert v. Long Island R. W. Co.*, 43 N. Y. 502, as to there being no right to incur danger to save property, are mere *dicta*; and the later cases in the same Court of *Rexter v. Starin*, 73 N. Y. 601, and *Wasmer v. Delaware etc. R. W. Co.*, 80 N. Y. 212, are directly opposed to any doctrine of that kind. There was the most culpable negligence in not properly covering the blast in question, and the accident was the natural and probable result of operations of this kind negligently carried on in a thickly populated district. The amount allowed for damages is not excessive when the very serious injuries suffered by the plaintiff are considered, and the judgment should be affirmed.

W. R. Meredith, Q. C., in reply.

December 24th, 1892. HAGARTY, C. J. O.:—

I am unable to agree with the argument addressed to us by the appellants, that the conduct of the plaintiff in endeavouring to stop the horses was an exposure of himself to injury, without which the accident to him would not have happened.

This seems to be the only question requiring decision.

Negligence in firing the blast has been found.

The jury found that "he exposed himself in trying to save his property, but we consider his action justifiable."

I understand this to mean that this was a natural act that any reasonable man would do on such an occasion, and I would add to the "saving of his property," the other reasonable and proper motive, "to prevent mischief and danger to others by his horses escaping from control."

I think the learned Chancellor has rightly stated the law in the Divisional Court, and I agree in his views and his result.

Judgment.

HAGARTY,
C.J.O.

I think the plaintiff acted in a most natural and proper manner. He left the horses in care of Bennett. Had he made no attempt to stop them, and they had injured person or property, he would probably have been charged with neglect.

As has been often said, a man in a moment of pressing danger cannot calmly weigh the chances of two or three lines of conduct.

It is quite true that had he remained where he was he would have been safe, but in the state of affairs disclosed in evidence, I think his conduct has been just what the large majority of reasonable men would have done under the circumstances.

If he had been standing by his horses holding the reins, and in his efforts to hold them in, he had been dragged along and injured, I think the persons whose negligent act caused them to start could not be excused, because had he at once let go he might have escaped injury.

I cannot agree that the injury to plaintiff was not—on the evidence—the sufficiently proximate result of the defendants' negligent act. It was a reasonable and natural course which the plaintiff adopted to prevent mischief, under the reasonable expectation of being able to stop the horses.

I think that *Anderson v. Northern R. W. Co.* 25 C. P. 301 (whether rightly or wrongly decided), is no help to the decision of this case.

An outsider or stranger rushing into imminent danger to save life or property cannot in my opinion be likened to the case before us, where the plaintiff properly, and, as I think, according to his duty, endeavoured to stop his own runaway team of which he was in charge.

Had his horses dashed into the street, and a stranger had attempted to stop them, and had been injured, I can then understand the *Anderson Case* being referred to.

I refer to the principle laid down by the text writers, and to such cases as *Harris v. Mobbs*, 3 Exch. D. 268; *McMahon v. Field*, 7 Q. B. D. 591; *Firth v. Bowling Iron*

Co., 3 C. P. D. 254; *Cameron v. Milloy*, 14 C. P. 340; *Edgar v. Northern R. W. Co.* 11 A. R. 452.

Judgment.
HAGARTY,
C.J.O.

I think that the appeal should be dismissed.

OSLER, and MACLENNAN, JJ.A., concurred.

BURTON, J. A. :—

I think that if the cause of action had been set forth in the statement of claim as it has been established in evidence, the statement would have been demurrable.

The statement shews a good cause of action, but it was not proved.

The rule applicable to a case of this kind is thus stated by Mr. Cooley, in his work on torts: "When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through any serious consequence resulting therefrom, this consequence must not only be shewn, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause."

The subject of proximate and remote cause, as applied to injuries resulting from negligence, or rather the application of the rule, is frequently one of great difficulty; but the principle is, I think, well expressed by one Judge in these words: "When a defendant has violated a duty imposed upon him by the common law, he should be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct, and the liability extends to such injuries as might reasonably have been anticipated under ordinary circumstances as the natural and probable result of the wrongful act."

And Chief Justice Shaw very succinctly states the reason for looking to the proximate cause thus: "The law, however, looks to a practical rule adapted to the rights and duties of all persons in society in the common and ordi-

Judgment.

BURTON,
J. A.

nary concerns of actual and real life, and on account of the difficulty in unravelling a combination of causes, and of tracing each result as a matter of fact to its true, real, and efficient cause, the law has adopted the rule before stated of regarding the proximate and not the remote cause of the occurrence which is the subject of enquiry."

In the present case it is uncontradicted that the plaintiff was in a place of safety, where he could not have been injured either by the falling stones or by the runaway horses at the time of the wrongful act complained of; had he remained there the injury which he complains of could not have occurred; the horses might have run away and injured themselves or others, but for that injury the defendants were probably responsible.

The plaintiff voluntarily left his place of safety and attempted to stop the horses, and this new act, supervening upon the wrongful act of the defendants, brought about the misfortune of which the plaintiff complains.

This was, perhaps, a natural thing for the plaintiff to do, and was a meritorious thing on his part; but was it a matter in the contemplation of the defendants that a person in perfect safety should go out of his way to incur this risk? It was this attempt to stop the horses and not the original omission of the defendants in insufficiently covering the blast which caused the injury to the plaintiff.

The facts being undisputed, the question "which was the proximate cause of the injury?" becomes one of law.

I know of no rule of law that would make the act of the defendants the proximate cause of the injury, because the act of the plaintiff was a natural one in order to save the loss. To speak of it as a duty is, I think, a misapplication of terms. When speaking of "duty" in this connection, we mean legal obligation, and it is clear there was no duty imposed upon the plaintiff in that sense.

Those cases where, owing to the negligence in keeping a bridge in repair, and similar cases, a horse has fallen through, and in course of extricating it the plaintiff has sustained damage by the struggling of the animal, are

very distinguishable. The efforts in those cases became necessary under the direct and immediate force of the first cause, and the injury grew immediately out of and was the direct result of the original act of negligence; it was but a single happening or event which was directly and immediately occasioned by the first cause.

I agree with Mr. Justice Meredith, that the rule which is sometimes invoked where a party is placed in imminent peril by the negligence of another, has no application; the plaintiff was in no danger, and voluntarily placed himself in peril.

I feel pained in being obliged to come to this conclusion, but I again quote from Chief Justice Shaw in the case to which I have already referred :

"It is no argument against this conclusion, that if the defendants are not liable in this case a suffering party is without remedy. The loss must fall within the same category with the infinite number of cases where persons sustain great losses from pure accidents and misfortunes for which no person is responsible, and where the loss must finally rest where it first falls."

Appeal dismissed with costs,
BURTON, J. A., *dissenting.*

Judgment
BURTON,
J. A.

THE TRUST AND LOAN COMPANY OF CANADA v. STEVENSON ET AL.

Limitation of actions—Mortgage—Payment—R. S. O. ch. 111, secs. 22 and 23—Bankruptcy and Insolvency—29 Vic. ch. 18, sec. 19.

The assignee in insolvency, under the Insolvent Act of 1865, of the plaintiffs' mortgagor, in 1869 conveyed in part satisfaction of his claim, without covenants on either side, the mortgaged property to a subsequent mortgagee, who had valued his security, the plaintiffs' mortgages being referred to in a recital. The subsequent mortgagee shortly afterwards conveyed the property to a third person, but notwithstanding this conveyance continued to pay interest to the plaintiffs till within ten years of the bringing of this foreclosure action :—

Held, on a case stated in the action for the opinion of the Court, with liberty to draw inferences of law and fact, that it was proper to infer that the provisions of section 19 of the Insolvent Act of 1865 had been complied with ; that under that section the subsequent mortgagee taking over his security would be primarily bound to pay off the prior encumbrances ; and that therefore his payments kept alive the plaintiffs' rights.

Judgment of the Chancery Division, 21 O. R. 571, reversed, OSLER, J. A., dissenting.

Statement. THIS was an appeal by the plaintiffs from the judgment of the Chancery Division, reported 21 O. R. 571.

The action was brought for foreclosure of certain mortgages held by the plaintiffs, and the facts are set out in the following special case submitted for the opinion of the Court :—

1. One Philip Edgar being seized of the lands in question, herein, namely, the east half of lot number 3, in the 3rd concession of the township of Fredericksburgh, in the county of Lennox and Addington, granted the same by way of mortgage unto the plaintiffs, under their then corporate name of the Trust & Loan Company of Upper Canada, for the purpose of securing payment to the said company of the sum of \$800 and interest as is in the said mortgage set forth (of which mortgage a true copy was annexed), and afterwards the said Philip Edgar did further grant and mortgage the said lands unto the said plaintiff company under their then corporate name of the Trust & Loan Company of Upper Canada for the purpose of securing payment to the said company of the

sum of \$1,200 and interest, as in the said mortgage set forth (of which mortgage a true copy was annexed). Statement.

2. Afterwards and by an indenture of mortgage bearing date the fourteenth day of March, 1867, the said Philip Edgar granted and mortgaged the said lands unto the late Honourable John Stevenson for the purpose of securing payment of the sum of \$5,000 together with interest as is therein set forth (of which mortgage a true copy was annexed).

3. Afterwards the said Philip Edgar became insolvent and under and by virtue of the provisions of the Insolvent Act of 1865 he made an assignment for creditors to one W. S. Robinson, an official assignee (of which assignment a true copy was annexed).

4. Afterwards, and by deed of grant bearing date the eleventh day of May, 1869, the said Robinson, as such official assignee as aforesaid, granted and conveyed the said lands to the said the late the Honourable John Stevenson, now deceased (of which deed a true copy was annexed).

5. Afterwards, and by deed of grant, bearing date the twenty-seventh day of September, 1869, the said Honourable John Stevenson granted and conveyed the said lands unto one George A. Stevenson and by deed of grant, bearing date the twentieth day of June, 1872, the said George A. Stevenson granted and conveyed the said lands unto one Jeremiah Perry, and by deed of grant, bearing date the twenty-sixth day of December, 1887, the said Jeremiah Perry granted and conveyed the said lands unto one Aylsworth B. Perry, and by deed of grant, bearing date the thirty-first day of December, 1888, the said Aylsworth B. Perry granted and conveyed the said lands unto the defendant Damon Perry.

6. At the time of the making of the grant of the said lands to the said the Honourable John Stevenson, as aforesaid, he, the Honourable John Stevenson, entered into possession and occupation of the said lands, and each one of the persons subsequently entitled thereto, as aforesaid,

Statement. entered into possession and occupation of the said lands at or about the time when the same were conveyed to him as aforesaid, and the defendant, Damon Perry, is now in occupation and possession thereof.

7. Neither the defendant Perry, nor those through whom he claims title to the said lands, has or have at any time acknowledged the existence of the plaintiffs' said mortgages or that the plaintiffs have any right, title or interest in or to the said lands otherwise than as is herein set forth.

8. From the time of the conveyance of the said lands to the Honourable John Stevenson as aforesaid, he, the Honourable John Stevenson, from time to time as the same became due, paid to the plaintiffs the interest upon their said mortgages until the time of his death, which happened in the year 1884.

9. On or about the twenty-third day of September, 1881, the said the Honourable John Stevenson entered into an agreement with the plaintiffs relating to their said mortgages (a true copy of which agreement was annexed).

10. The said the Honourable John Stevenson in and by his last will and testament appointed the defendants Howard S. Stevenson, William Henry Stevenson, and John Horace Stevenson, to be the executors of such will; and the said defendants, Howard S. Stevenson, William Henry Stevenson, and John Horace Stevenson, accepted the burden of the trusts of the said will and procured the same to be proved in the proper Surrogate Court in that behalf, and they are now the executors of such will.

11. Since the time of the death of the said the Honourable John Stevenson the said defendants Howard S. Stevenson, William Henry Stevenson, and John Horace Stevenson, as such executors, as aforesaid, have from time to time as the same became due, paid to the plaintiffs the interest which has accrued to the plaintiffs by the said annexed agreement (see clause 9), the last of which payments was made on or about the nineteenth day of November, 1890, which lastly mentioned payment satisfied the interest that fell due pursuant to the terms of the said

agreement on the first day of October, 1890, but no sum Statement.
has ever been paid to the plaintiffs on account of the principal moneys referred to in the said mortgages and the said agreement.

12. The said the Honourable John Stevenson died possessed of real and personal estate of a considerable value, and the plaintiffs in and by their statement of claim in this action prayed that the estate of the said the Honourable John Stevenson be administered by the order and under the direction of this Honourable Court for the benefit of the plaintiffs and the other creditors of the said the Honourable John Stevenson.

13. After the commencement of this action and on the thirteenth day of January, 1891, two days before the delivery of the said statement of claim, the said defendant executors, without notice to the plaintiffs, procured an order for the administration of the said estate of the said the Honourable John Stevenson to be issued by the Local Master of this Court at Napanee; and the plaintiffs have since proved their said claim under the said agreement in the said administration proceeding, but nothing has as yet been paid to the plaintiffs in connection with the said administration proceeding.

14. The Court is to be at liberty to draw all proper inferences both of law and of fact from the statements herein contained.

15. The plaintiffs claim that they are entitled to be paid the amount of their said mortgage claim, and that in default thereof they are entitled to a judgment for foreclosure of the equity of redemption of the defendant, Damon Perry, in the said lands.

16. The defendant, Damon Perry, claims that the plaintiffs' said mortgage claim is barred by the Statute of Limitations, to wit, R. S. O. ch. 111, secs. 19, 20, 21, 22 and 23, and he claims the benefit of that Act.

17. The question for the opinion of the Court is whether under the circumstances herein set forth the plaintiffs' said mortgage claim has been barred by the operation of the Statute of Limitations.

Statement.

18. If the Court shall determine this question in the affirmative then judgment is to be entered dismissing the plaintiffs' action as against the defendant, Damon Perry, with costs, but as against the defendant executors without costs; but if the Court shall determine this question in the negative then judgment is to be entered in favour of the plaintiffs for foreclosure in the usual form with a reference to the Master in Ordinary.

Nothing turned upon the provisions of the mortgages and the assignment for the benefit of creditors referred to in the special case and it is unnecessary to set them out. The mortgages were payable in 1867 and 1869 respectively.

In the deed from the assignee to the Honourable John Stevenson, referred to in the special case, it was recited that the insolvent at the time of executing the assignment held an interest in the lands in question subject to a certain mortgage thereon held by the plaintiffs securing \$2,000 and interest and to a certain mortgage to one J. H. Brown securing \$1,150 and interest, and to a mortgage to the said Stevenson securing \$5,000 and interest; that Stevenson had, upon oath, set a specified value on his said security and had stated such value to be \$3,750; that at a meeting of the creditors of the insolvent it had been resolved that the said value placed upon the said security by the said Stevenson should be accepted and that the assignee should execute a quit claim deed of his interest and right as such assignee to the said Stevenson.

It was then witnessed that in consideration of the premises and of one dollar and in pursuance of and in accordance with the said resolution the assignee did grant, etc., to the said Stevenson "all the rights and interest of the insolvent" in the lands in question. There were no covenants or further provisions in the deed.

In the agreement between the Honourable John Stevenson and the plaintiffs, referred to in the special case, it was recited that the plaintiffs were mortgagees of the lands in question under a mortgage made by Edgar, and that there-

was due to the plaintiffs the principal sum of \$2,000 ; that the said Stevenson was then the owner of the lands and had assumed payment of the mortgage debt, and had agreed with the plaintiffs to pay off the same. Statement.

It was then provided that in consideration of the premises and the mutual agreements therein made the payment of the said principal sum of \$2,000 should be extended for four years from the 1st of October, 1881, and that the said principal sum should bear interest at the rate of eight per centum per annum, with a proviso for a reduction in the rate of interest on punctual payment and with liberty to pay the principal money before maturity, if desired.

The special case was argued before the Chancery Divisional Court on the 5th of December, 1892, and judgment was afterwards delivered by that Court in favour of the defendants.

The plaintiffs appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 20th of October, 1892.

A. H. Marsh, Q. C., for the appellants. This case is to be determined by the application of R. S. O. ch. 111, sec. 23, of which the material parts are as follows : " No action shall be brought to recover out of any land any sum of money secured by any mortgage, but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge unless some interest thereon has been paid, or some acknowledgment of the right thereto has been given in writing by the person by whom the same is payable, or his agent, to the person entitled thereto, or his agent." The Privy Council draw a clear distinction between the " person by whom the same is payable," whose written acknowledgment is sufficient to stop the running of the Statute of Limitations, and the person whose payment of interest will have a similar effect, and they say : " Their Lordships have not been referred to any case where it has been decided that payment made by some person concerned to answer the debt has been held

Argument. to be insufficient to keep a right alive against the party charged in the suit 'merely because he was not that party or his agent': *Lewin v. Wilson*, 11 App. Cas. at p. 644. Upon purchasing the lands in question from the assignee in insolvency of the mortgagor, John Stevenson became bound to indemnify the insolvent estate against the mortgage: *Boyd v. Johnston*, 19 O. R. 598. The liability so assumed by John Stevenson was a personal obligation which he was under to the Edgar estate, and was a continuing obligation, and did not come to an end when he subsequently sold and conveyed the lands to his son, George A. Stevenson: *Campbell v. Robinson*, 27 Gr. 634, and cases there cited. This obligation of John Stevenson to the Edgar estate, made him a "person concerned to answer the debt" within the meaning of that term as used by the Privy Council in *Lewin v. Wilson*. The position of a mortgagor who has covenanted with his mortgagee for the payment of a mortgage debt, selling his equity of redemption subject to the mortgage, is that of surety to the purchaser for the payment of that debt: *Campbell v. Robinson*, 27 Gr. 634. Therefore, upon the purchase of the equity of redemption by John Stevenson, the latter, as between himself and the Edgar estate, became the principal debtor, and the Edgar estate became (as between itself and John Stevenson) only secondarily liable to the payment of the mortgage debt, that is, as between John Stevenson and the Edgar estate, the former became the principal debtor, and the latter became surety. See *Duncan Fox & Co. v. North and South Wales Bank*, 6 App. Cas. at pp. 11, 12, 13. This relationship authorized John Stevenson to make payments on the mortgages in question as the agent of the Edgar estate, and payments so made by him would prevent the statute from running. See the dissenting judgment of Strong, J., in *Lewin v. Wilson*, 9 S. C. R. at pp. 652, 655, 656, 657. It may fairly be presumed in explanation of what occurred, that upon the sale by John Stevenson to George A. Stevenson, there was some arrangement by which the former undertook to

satisfy the existing incumbrances on the land, for otherwise it would appear that John Stevenson, for fifteen years after this sale, and his executors, for a further period of six years, continued to pay, every half-year, interest upon mortgages which they were not bound to pay. Or it may fairly be presumed that the payments so made by John Stevenson and his executors, were made by them as agents of the several persons claiming title under John Stevenson, or in pursuance of the obligation to the Edgar estate: *Adnam v. Earl of Sandwich*, 2 Q. B. D. 485. John Stevenson, by entering into the agreement with the plaintiffs, did not become any the less a "person concerned to answer the debt," but even if the agreement had any such operation, it could not affect this action, as the agreement was made on the 23rd of September, 1881, while this action was commenced on the 4th of December, 1890, and John Stevenson paid an instalment of interest on the 1st of April, 1881, within ten years before the commencement of this action. Argument.

Delamere, Q. C., for the respondents. The payment of interest required by the statute must be by the person by whom the same is payable, or his agent. The doctrine is based on the idea that payment is an acknowledgment and therefore the payment must be made by a person who could give a binding acknowledgment of title. The payment in this case was not by such a person. John Stevenson was not the person by whom the money was payable, nor was he the agent of such person. The words "concerned to answer the debt" must be held to mean a person bound to answer it by being a party to the mortgage, or by being at the time of payment the owner of the estate, or having some interest in the estate, and entitled to redeem. Payment in this case made after the person paying had ceased to have any interest in the estate and not being bound to pay, was not by a person really "concerned to answer the debt," and was simply a payment by a stranger. The equitable doctrine of obli-

Argument. gation does not bind a purchaser after resale by him. The rule laid down in *Lewin v. Wilson*, 11 App. Cas. 639, is that the only person whose payment on account will prevent the right of foreclosure from being barred, is the mortgagor or his privy in estate, or the person who, by the terms of the mortgage, is entitled to make payment, or the agent of such person, and in this case payment was not made by any such person. See *Stamford, etc., Banking Co. v. Smith* (1892), 1 Q. B. 765. Nothing can be presumed as against the defendant Perry, who is an innocent purchaser for value, and the payments cannot affect his rights. It cannot be presumed that there was any arrangement between John Stevenson and Geo. A. Stevenson, nor can John Stevenson in any way be considered an agent of the Edgar estate or of any person claiming title under John Stevenson. He was not in fact such agent, and the plaintiffs themselves in their agreement treated him as owner.

A. H. Marsh, Q. C., in reply.

December 24th, 1892. HAGARTY, C. J. O.:—

The case seems to me to turn very much on the provisions of the Insolvent Act in force at the time of the assignment in May, 1869, viz.: 29 Vic. ch. 18.

Section 18 provides that on a secured claim being filed the assignee shall consult the creditors as to consenting to the retention of the security or to requiring an assignment of it.

Section 19. "If the security consists of a mortgage upon real estate * * the property mortgaged shall only be assigned and delivered to the creditor, subject to all previous mortgages * * holding rank and priority before his claim; and upon his assuming and binding himself to pay all such previous mortgages, * * and upon his securing such previous charges upon the property mortgaged in the same manner and to the same extent as the same were previously secured thereon; and thereafter the holders of such

previous mortgages * * shall have no further recourse or claim upon the estate of the insolvent." Judgment.

This section is rather infelicitously worded in its latter part.

HAGARTY,
C.J.O.

But the first part is clear that the valued security so assigned is to be subject to prior securities.

On the assignment being made, Stevenson held the land subject to the two recited mortgages, and he would be bound to redeem them.

We are not informed in the case stated, whether he did any act assuming the prior mortgages, or (in the curious language of the section) "securing such charges" in the same manner as they were previously secured, after doing which the previous mortgagees should have no further claim on the estate of the insolvent.

We cannot, under our power to draw inferences, assume that Stevenson did not obey the directions of the statute. Our presumption should be in the opposite direction.

But however this may be, he took the equity of redemption under the statute subject to the prior charges, and *prima facie* he would be liable therefor.

No explanation is offered in the special case as to his conduct in apparently giving his whole estate in the premises to G. A. Stevenson, as in fee, and covenanting against his own acts.

His regular payment of the interest for so many years to the plaintiffs, and his final contract in 1881 with them for further extension of the mortgage for four years, and his declaring that he still owned the equity, are left unexplained.

If I were at liberty to guess at an explanation it might be this: Nine thousand dollars is the stated consideration in the deed to G. A. Stevenson (said in the argument to be his son); that this consideration was made up of all the mortgages—viz., \$2,000 on Edgar's two mortgages; Brown's, \$1,100; his own, \$5,000—with the high rates of interest charged these would easily run up to \$9,000.

Judgment. That in this view, and with the knowledge that he must pay off the previous encumbrances, the consideration was so fixed. As between him and the plaintiffs, he was, of course, bound expressly by the agreement of 1881.

HAGARTY,
C.J.O.

As to the defendant Perry, who claims under G. A. Stevenson, the grantee of September, 1869, the sole defence is the Statute of Limitations ; that the payments made of interest to the plaintiffs, must be treated as by a stranger, not being by a person bound or liable to pay, and from whom the payees were not bound to accept payment.

I am unable to accept this as the true position. I think our then Insolvent Act describes and fixes the position and liability of the vendee under the assignee, that he takes subject to the prior encumbrances.

Stevenson bought expressly subject to Edgar's mortgages to the plaintiffs, and became entitled to redeem them and when he sold to his son the inference seems reasonable that he knew he was liable and acted as so liable as he really was.

I consider this view of the position of the parties meets the learned Chancellor's point, "that it is not for us to assume that the payments so made were in pursuance of some obligation which will affect the title now vested in the defendant Perry by virtue of length of possession."

I think we must allow the appeal.

BURTON, J. A. :—

The plaintiffs have taken foreclosure proceedings against Damon Perry, and the sole question is whether these payments of interest by John Stevenson prevent the running of the Statute of Limitations in favour of the defendant. The case falls within section 22, R. S. O. (1877) ch. 108.

It may perhaps be material to mention that both the mortgages were due and payable before the conveyance of John Stevenson to his son.

There can be no doubt as to the general question that where a vendor sells a property subject to an encum-

brance, the purchaser is bound in equity to indemnify the vendor against the encumbrance, and I take it that this obligation to indemnify continues, notwithstanding that he has ceased to be interested in the land.

Judgment.
BURTON,
J.A.

That is the general rule, a rule of equity founded upon justice and common sense. But in the case of a transfer of the estate by the assignee in insolvency to a creditor holding a mortgage security, who has placed a value upon it, it does not become necessary to invoke that rule—the statute itself imposes an obligation upon the creditor to assume and secure the previous mortgages, the holders of which are thereafter precluded from ranking upon the insolvent's estate.

Stevenson, therefore, became the person in law liable to pay these mortgages, and, if the provisions of the statute have been complied with, the sole person liable to pay them, and the proper inference to draw is that everything was rightly done.

Stevenson, therefore, stood precisely in the position of the original mortgagor, and was liable to pay, and entitled to redeem the mortgaged premises.

How then does the matter stand? The mortgages were registered so that the successive purchasers had notice of their existence, even if we were at liberty to presume, which we are not, that any of the grantors was guilty of the fraudulent concealment of them. It is reasonable, therefore, to infer that the present defendant was aware of them, and if he was aware of them, and has himself paid neither principal nor interest, it is not too much to say that his contention is entitled to no more consideration in a court of justice than we are compelled to accord to it.

The members of the Judicial Committee in *Lewin v. Wilson*, 11 App. Cas. 639, remark that they have been referred to no case where it has been decided that payment made by some person concerned to answer the debt, has been held insufficient to keep a right alive against the

Judgment. party charged in the suit, merely because he was not that party or his agent.
BURTON,
J.A.

The case in which these remarks were made was decided on the 25th of June, 1886, and on the 13th of the following month the Court of Appeal in England gave a decision, *Newbould v. Smith*, 33 Ch. D. 127, which would seem to be entirely opposed to the views of the Privy Council, holding in fact that a payment by the original mortgagor is not sufficient to prevent the statute running unless it is shown that he made the payment as agent of the then owner of the land.

Lindley, L. J., mentioned as an additional ground that the debt, which was a simple contract debt, was barred by the statute, and therefore that there was no debt which he was liable to pay.

The judgment was adversely criticised at the time and was taken to the House of Lords, who affirmed it on a different point, 14 App. Cas. 423, but in referring to the decision in the Court of Appeal Lord Herschell remarked: "I must not be considered as in any way affirming or giving my adhesion to that proposition," and both of the other learned Lords who took part in the judgment guard themselves against being taken as adopting or expressing any opinion upon it.

As pointed out in some of the criticisms on the judgment of the Court of Appeal, the mortgagees, if the decision be correct, would be in a perfectly-defenceless position. They know nothing of the transfer of the property, and if they apply to the mortgagor to ascertain if he is still in possession, the answer may be an untrue "Yes."

That actually occurred in the present case.

In September, 1881, the Trust and Loan Company appear to have applied to Stevenson for an agreement to pay off the mortgages in four years, and in the agreement executed on that occasion he untruthfully recited that he was the owner of the equity of redemption.

The decision of our ultimate Appellate Court goes the full length of deciding that a payment by the principal

debtor is sufficient to keep a collateral mortgage given by the surety alive, even although the land had passed into the hands of others, and is binding upon us, and has settled the law for the colonies; the only difference is that the payment in this case was made, not by the original mortgagor, but by one who had assumed his position, and was bound by statute to pay the debt.

I can see no distinction. In order to carry out his contract he must necessarily have the right to redeem the mortgage, and the mortgagee was bound to receive the money.

The present defendant presumably took the mortgages into consideration when paying his purchase money. But whether that was so or not he had notice and he had the means of ascertaining whether the mortgages were still outstanding, whilst the mortgagees, receiving their interest regularly, had a right to assume that the person paying it was still the owner of the equity of redemption.

I think the circumstance of Stevenson being under this statutory obligation to pay has been overlooked in the Divisional Court, and that we should allow the appeal.

MACLENNAN, J. A. :—

The question before us is, whether John Stevenson stood in any such relation to the plaintiffs or to their mortgages, or to the land comprised therein, for a sufficient time before the commencement of the action, as to make his payments of interest good, within the meaning of the Limitation Act, R. S. O. ch. 111.

In the reasons of appeal, and on the argument before us, the question was treated by counsel on both sides as depending on section 23 of the Act, but in *Lewin v. Wilson*, 9 S. C. R. at p. 649, Mr. Justice Strong pointed out that an action of foreclosure is an action for the recovery of land, and that the section of the New Brunswick Limitation Act which was there applicable was the one which corresponds with our section 22, and not the one which corres-

Judgment.

BURTON,
J.A.

Judgment.

MACLENNAN,
J.A.

ponds with our section 23. The majority of the learned Judges of the Supreme Court were of the other opinion, but the Judicial Committee of the Privy Council, on appeal, adopted the opinion of Mr. Justice Strong, 11 App. Cas. at pp. 642, 647. The present action is also one of foreclosure, and therefore we must hold that the case is governed by section 22, and not by section 23, so far as there may be any difference between the two sections as to the class of persons by whom valid payment may be made of principal money and interest. It is true that in making the revision of 1887 section 23 was altered from the form in which it had stood from the year 1834, when it was first enacted, by the insertion in the second line of the words "out of any land or rent." I think, however, these words make no difference in a case of foreclosure, the one section still relating to actions for the recovery of land, and the other to actions for the recovery of money. It cannot now be contended that payment by a mere stranger will do. He must be a person who has some right to pay, and whose payment the mortgagee could not properly refuse. In *Lewin v. Wilson*, 11 App. Cas. at p. 646, Lord Hobhouse says: "In this case their Lordships think it sufficient to say that payments made by a person who under the terms of the contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the defeasance or redemption of the mortgage," are sufficient.

Their Lordships had previously declared that no case had decided that the word "payment," in section 30 (our section 22), is to be construed as if it was actually followed by the words in section 29 (our section 23) which are clearly attached to the word "acknowledgment," and that a wider range of exposition is allowable and had been taken, and while they used the language above quoted with reference to the case before them, it is evident they did not mean by that language to lay down a hard and fast rule for all cases. They say they think it sufficient for the case before them to use the language they have used, and approve of what

learned Judges have done in other cases, namely that in expounding the word "payment" they have used such expressions as were calculated to shew in the case before them that the payment relied on was or was not within the statute. In other words, as I think, the Judicial Committee in effect say that every case must depend on its own circumstances, as to whether a payment is good or not.

Judgment.

MACLENNAN,
J.A.

It now becomes important to consider the effect of John Stevenson's purchase from Robinson the assignee in insolvency. Edgar, the mortgagor, owed him \$5,000, for which he held a mortgage then two years over due. There were three prior mortgages, two of them those held by the plaintiffs, although the plaintiffs' mortgages only covered 200 of the 300 acres covered by Stevenson's mortgage. He valued his security at \$3,750, and the mortgaged lands were conveyed to him in satisfaction of so much of his debt. He then became the absolute owner of the land; \$3,750 of his debt was satisfied, and he was still a creditor of Edgar and of his estate for \$1,250. The transaction had this further effect; he now became the person to pay the prior mortgages. Up to this moment Edgar was the only person liable to the plaintiffs, but now Stevenson having bought the land, in substance from Edgar though in form from the assignee, became bound as between himself and Edgar to save Edgar from further payment, by making payment for him. If he had bought from Edgar directly, and had obtained his conveyance from him, that would be indisputable: *Waring v. Ward*, 7 Ves. 337; *Jones v. Kearney*, 1 Dr. & W. 155; *Thompson v. Wilkes*, 5 Gr. 594; Dart, 6th ed., p. 629; Sugden, 14th ed., p. 198. sec. 8; and per Strong, J., *Williston v. Lawson*, 19 S. C. R. at p. 678; and I am unable to see that it makes any difference that the sale and the conveyance were by the assignee and not by Edgar himself. The assignee was a trustee not only for the creditors but for Edgar. The land was Edgar's. He had an undoubted right to pay all his creditors and to get back this land up to the moment it was conveyed. The conveyance in its very form is a conveyance of Edgar's

Judgment. right and interest in the land ; and I think on well estab-
MACLENNAN, lished principles the effect of the sale must be the same
J.A. as if it had been with Edgar himself. But besides the
effect of the transaction by the rules of equity, the Insol-
vent Act, under which the sale took place, 29 Vic. ch. 18,
sec. 19, made this provision. It declared that in such a
case, "the property mortgaged shall only be assigned and
delivered to the creditor subject to all previous mortgages,
* * holding rank and priority before his claim ; and
upon his assuming and binding himself to pay all such pre-
vious mortgages, * * and thereafter the holders of such
previous mortgages, * * shall have no further recourse
or claim upon the estate of the insolvent." I think the
effect of this enactment, as well as of the transaction
itself, apart from the enactment, was that Edgar could
have required and compelled John Stevenson at once to
pay off, or at all events to relieve him from paying and
from liability to pay, the plaintiffs' mortgages, which were
then both overdue. The case does not state what, if any,
instrument, John Stevenson executed, in compliance with
the terms of the statute ; but we cannot assume that any
instrument which he signed would or did fall short of
making him liable at Edgar's instance to pay off the prior
mortgages. He was to "bind himself" to pay them, and
he could not be properly bound to do that to any one else
than the debtor. But whether he did or did not sign any
instrument, the obligation in favour of the debtor, in my
judgment, arose to pay off the prior mortgages.

If I am right in this conclusion that this obligation arose,
the next question is whether anything has happened since
to put an end to it.

The case does not say that Edgar ever obtained his dis-
charge in the insolvency proceedings, and we cannot
assume that he did, or that if he did, it extended to the
mortgage debts in question. If he had, then the personal
obligation of John Stevenson to save him from payment
would have ceased, and after September, 1869, Stevenson
would have become a stranger to the mortgages, and pay-

ments by him would be purely voluntary. But as long as Edgar's personal liability as a debtor continued, so long did his right endure to compel Stevenson to pay. In the case above referred to in the Privy Council it was further held that the right to pay continued after the debt became due the same as before; and so in my judgment Edgar's right to compel Stevenson to pay, and Stevenson's corresponding duty to pay, continued during all the years which have elapsed since he parted with the property. The case does not state that Stevenson paid from 1869 to 1881, in pursuance of any request from Edgar, but he did pay in fact, and as we are authorized by the case to draw proper inferences of fact, I think it is not an improper or unreasonable inference to draw from the admitted facts, that he did so because he was required by Edgar to do what he was bound to do.

Judgment.
MACLENNAN,
J.A.

It is now settled by *Lewin v. Wilson*, 11 App. Cas. 639, that a payment by the debtor himself is a good payment, and I think it follows that payment by a person who has become bound to the debtor to pay must also be good. The obligation to the debtor is equivalent to, and involves, authority from him to pay, and must be as good for the purposes of the statute as a payment by himself. He is a person "concerned to answer the debt" in the language of Lord Hobhouse.

If, as I think, Stevenson was bound to Edgar, in the manner and to the extent I have described, he could not relieve himself from that obligation by the instrument of the 23rd of September, 1881; and the payments he made after that, were payments of the mortgage debt, within the meaning of the statute, quite as much as those he made before.

I am therefore of opinion that the judgment appealed from is wrong and that the appeal should be allowed.

OSLER, J. A.:—

I think we cannot infer as a fact in the case, under any authority which the special case gives us to draw infer-

Judgment.

OSLER,
J. A.

ences, that when Stevenson acquired the equity of redemption from the assignee of Edgar, the insolvent, he entered into any obligation either with the assignee or with the holders of previous mortgages to pay off those mortgages. The case is so baldly stated, and with so much reticence as to the proceedings in the insolvency that we are not warranted in assuming so important a fact, more especially as, if it were so the plaintiffs must have known it, and no allusion was made to it or to section 19 of the Insolvent Act of 1865, on the argument here or below. The evident intention of that section was that when the holder of a security, upon land already mortgaged or charged, valued his security, and the estate mortgaged was assigned to him by the assignee, he should assume the position of the insolvent mortgagor with regard to the holders of the previous mortgages, contracting with them to pay just as the insolvent had done, whereupon *they* should have no further recourse or claim upon the estate of the insolvent. This would seem to involve the necessity of a direct agreement between himself, the assignee, and the holders of the previous mortgages, who might not all take the same view of the value of the security or be willing to give up their recourse against the insolvent's estate if they deemed the security insufficient. In the absence of any such express personal agreement to pay the previous mortgages, the creditor, in this case Stevenson, thus acquiring the equity of redemption, would simply acquire it as the section provides, and as he could do without the aid of the section, subject to the previous charges, and that being so I have not seen my way to differ from the view taken in the Court below by the learned Chancellor, and my brother Meredith, of the decision of the Privy Council in *Lewin v. Wilson*, 11 App. Cas. 639, namely that the expression used in the judgment of Lord Hobhouse as to payment made by a party "concerned to answer" the debt must be read as merely synonymous with and not expansive of the term "entitled" to pay. "In other words," as the learned Chancellor says, "it is not enough that payment be made by a stranger or by a

person once interested, but who has ceased to be so in the estate or in the contract; the money must proceed from one who has a right to pay as privy in estate or bound by contract." Stevenson would have been in the latter position could we infer that all the requirements of section 19 had been complied with, but as we are not at liberty to do that, for the reasons I have mentioned, and as he had parted with his estate on the 27th September, 1869, the payments of interest made by him up to the date of the agreement made by him with these plaintiffs on the 23rd September, 1881, are not payments within the 22nd section of chapter 111, which can keep alive their right to bring this action against the defendants for the recovery of the mortgaged property.

Judgment.

OSLER,
J.A.

It seems to me a very violent assumption that these payments were made by him as agent for or at the request of Edgar, the insolvent, who, for anything we are told to the contrary, may have procured his discharge in insolvency in the regular way, or in pursuance of any equitable obligation on his part towards the insolvent arising out of his acquisition of the equity of redemption, assuming that payments really so made would be payments within section 22. This obligation was merely an equitable obligation towards Edgar to indemnify him against the plaintiffs' mortgages, not a contractual obligation towards him or towards the plaintiffs. So far as the case shews the facts, I cannot infer that Edgar, who was an insolvent and therefore presumably without further interest in the matter, was even a moving cause towards those payments being made. It is for me a much more likely inference that they were made in consequence of some family arrangement between Stevenson and his immediate vendor, who purchased in September, 1869, and who conveyed again to Jeremiah Perry in June, 1872. The recitals in the agreement with the Trust and Loan Company of September, 1881, the most important one of which (that Stevenson was then the owner of the equity of redemption) is untrue, cannot be evidence against the principal defendant Perry. They do indeed

Judgment.

OSLER,
J.A.

suggest the idea that they may have been copied from some former agreement made between Stevenson and the Trust and Loan Company at a time when he really was the owner of the equity. But as in that event the Trust and Loan Company would be in possession of such an instrument the silence of the special case as to its existence, now or in the past, forbids us to draw any inference of fact on that point. So far, therefore, as the facts are disclosed I must agree with the judgment below in holding that the payments made by Stevenson after 1869 were voluntary and therefore that the plaintiffs were rightly held not entitled to recover.

*Appeal allowed with costs,
OSLER, J. A., dissenting.*

FARQUHAR ET AL V. CITY OF HAMILTON ET AL.

Arbitration and award—Contract—Reference to engineer of municipal corporation.

Under a contract with a municipality for the laying of block pavements on certain streets with a provision that "the decision of the city engineer on all points coming within this contract and specifications shall be final and conclusive whether as to the interpretation of the various clauses, the measurements, extra work, quantity, quality, and all other matters and things which may be in dispute, and from his decision there shall be no appeal," the city engineer is not disqualified, in the absence of fraud or of bad faith, from deciding whether certain work is or is not extra work and does or does not fall within the plans and specifications. The possible bias of the engineer in favour of the plans and specifications drawn by him is not sufficient to disqualify him. Judgment of ROSE, J., affirmed on other grounds.

Statement.

THIS was an appeal by the plaintiffs from the judgment of ROSE, J.

The plaintiffs were contractors and brought the action against the city of Hamilton and the city engineer asking payment of the sum of \$3,480.00 for alleged extras done by them in connection with their contract for the block paving of Barton street in the city of Hamilton. They

alleged that the plans and specifications for the work were deceptive and misleading; that the work in question was not indicated in any way in the plans and specifications; that the city engineer had negligently and unskilfully prepared the plans and deceived the plaintiffs, and had then wrongfully and unjustly refused to certify for the extra work so performed. The only question as to which a report is necessary is as to the position of the city engineer under the following clauses in the contract :— Statement.

26. The contract is to comprise the formation and completion of the several works as defined by the specifications and drawings accompanying. Should any discrepancies, however, appear, or should misunderstanding arise as to the meaning and import of the said specifications or drawings, or about the quality and dimensions of the materials, or the due and proper execution of the works, or as to the measurement, or quality and valuation of the works executed under this contract, or as extras thereupon, or deductions therefrom, the same shall be explained by the city engineer for the time being; and this explanation shall be final and binding upon the contractor, and the contractor so to execute the work according to such explanation, and without (*sic*) charge or deduction to or from the contract as the city engineer shall assess.

33. The term engineer shall apply to the city engineer for the time being, or some other officer or officers appointed by him or the council to act for him in special or particular cases, and he or they shall be the sole judges of the quantity or quality of the work done, and his or their decision thereon shall be final or conclusive as against the contractor; and should the work not be progressing to the satisfaction of the said engineer, he shall have full power to take it, or any part of it, out of the hands of the contractor, and to relet the same, or otherwise complete it, having first reported the same to the board of works, and having obtained the sanction of the council thereto; and thereupon all moneys due or falling due to the contractor shall be forfeited and applied on account of the completion

Statement. of the work, and he shall have no further claim upon the corporation.

48. The decision of the city engineer on all points connected with this contract and specification shall be final and conclusive, whether as to the interpretation of the various clauses, the measurements, extra work, quality, quantity, and all other matters and things which may be in dispute; and from his decision there shall be no appeal.

The action was tried at Hamilton at the winter assizes of 1891, before ROSE, J., who after reserving judgment dismissed the action with costs. He held that the work in question was necessary and beneficial, and had been used by the city, but that under *Green v. Orford*, 16 A. R. 4, the plaintiffs could not recover. He also held that the refusal of the city engineer to certify was not binding, on the ground that the engineer was interested in upholding his own plans, his judgment on this point being as follows:—

I further find that such work of excavation was necessary for the work in question; that the paving of the street would not have been permitted had such excavation not been made, and that being beneficial and necessary it has been utilized by the city. If I am right in my view that the work done was not called for by the contract, then can the plaintiffs recover without any contract? I will consider this later on, but in the meantime assuming the right to recover thereon, it now only remains to be determined whether the plaintiffs can succeed notwithstanding the clauses in the contract which were framed for the purpose of leaving the decision of all matters in the hands of the engineer. I think general condition 26 does not apply, as it cannot be said that any misunderstanding arose during the progress of the work nor was any explanation asked for or given. Nor do I think that general condition 33 applies, as this is not a question of the quality or quantity of the work done under the contract. Section 48, it was argued, constituted the city engineer sole arbitrator as to all "matters and things which may be

in dispute," it being provided by such section that from his decision there could be no appeal. Certainly this section provides in terms that "the decision of the city engineer on all points connected with this contract and specification shall be final and conclusive; whether as to the interpretation of the various clauses, the measurements, extra work, quality, quantity, and all other matters and things which may be in dispute, and from his decision there shall be no appeal." Without stopping to see whether by careful analysis it may not be held that such condition does not apply to the dispute in question, I think it does not stand in the plaintiffs' way. It seems to me that the principle of the decision in *Kimberley v. Dick*, L. R. 13 Eq. 1, applies, and that the facts here permit the decision asked for by the plaintiffs. First, I think there has been no reference to the engineer, and no decision by him. Referring to the concluding words of the judgment of Brett, M. R. in *Lawson v. Wallasey Local Board*, 48 L. T. N. S. 507, I find that the plaintiffs have only negotiated with the engineer, treating him as agent for the defendant corporation; but even had there been an application to the engineer and a decision by him, unless it had been with full knowledge of the facts, I think such decision could not be binding, on the ground that the engineer had a direct interest in finding against the plaintiffs' contentions, ruling that the profile exhibited the work as the engineer intended and so a bias was created against the plaintiffs. Assume that a dispute had arisen between the plaintiffs and the corporation, and that a third party, an engineer, not the city engineer, had been agreed upon by the parties as an arbitrator to consider the question in dispute between the parties, and that the fact was unknown to the plaintiffs that that engineer had drawn the profile in question, and as I have found here, had made an error in describing the work to be done, and that an award by such arbitrator had been attacked by the plaintiffs, on the ground that he, unknown to them, was interested in the decision, could such an award have stood? I think clearly not. I collected all the cases

Judgment.

Rosk, J.

Judgment. to which I had reference bearing on the point in *Conmee*
ROSE, J. v. *Canadian Pacific R. W. Co.*, 16 O. R. 639, to which I add
the case of *Kimberley v. Dick*, L. R. 13 Eq. 1, cited by Mr.
Osler on the argument, and the above case of *Larson v.*
Wallasey Local Board, 48 L. T. N. S. 507, also reported
in 11 Q. B. D. 229. See also *Pawley v. Turnbull*, 3 Giff.
70, referred to in *Kimberley v. Dick*. Referring to the
case of *Kemp v. Rose*, 1 Giff. 258, I find that facts existed
which tended to produce a bias in the mind of the engi-
neer, and therefore that this court is justified in interfering
with such decision, if in fact the engineer has entered
upon such enquiry and made a decision upon the point.

The plaintiffs appealed and the appeal was argued before
HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A.,
on the 15th of November, 1892, the argument proceeding
mainly on the construction of the contract and the facts.

Osler, Q. C., and McBrayne, for the appellants.
Mackelcan, Q. C., and Watson, Q. C., for the respondents.

December 24th, 1892. HAGARTY, C. J. O.:—

A full examination of the evidence makes it very difficult
on my part to accept my learned brother Rose's judgment.

I am wholly unable to see any evidence whatever, suffi-
cient in law to prevent the express contract between the
parties as to the engineer being binding.

There is no evidence of any conduct of the engineer
in any way impugning his good faith, or, as I think, to
warrant the imputation that he had prepared or sanctioned
any plan or drawing or profile of the work to mislead or
deceive intending contractors.

My learned brother considered that his decision could
not be binding on the ground that the engineer had a direct
interest in finding against the plaintiffs' contention, ruling
that the profile exhibited the work as the engineer had
intended, and so a bias was created against the plaintiffs.

We must be very careful not to confound an ordinary arbitrator between parties, and an engineer or architect of the employer who is agreed on in the contract to be the final judge of all disputes as to the value or the doing of the work, or of any extras claimed beyond the contract.

The latter may so misconduct himself in the discharge of his functions by fraud, or collusion with his employers, or by clear proof of bad faith to disqualify himself. Of this the well known case of *Kimberley v. Dick*, L. R. 13 Eq. 1, is an instructive example.

But the fact of his being the paid agent of the employer, and that his interest may be to please and satisfy him so that it might be supposed that he would be biased in his favour; these circumstances alone cannot disqualify him from making an effective decision.

I think that my learned brother's chief ground of objection to the engineer's decision was that in so deciding he was supporting the fairness and accuracy of his profile of the work, and, as it were, vindicating his professional character and his proper attention to his employer's interest.

But I think he has fairly vindicated both his honest discharge of his duty and the reasonable explicitness of the profile, and he is supported in his view by that of several experts.

The plaintiffs at a very early stage of the work were fully aware of the kind of work they now ask to be paid for. They had ample means of clearing up any alleged ambiguity or misunderstanding as to what they were expected to do. They seem to me to have taken no trouble to understand (if they really did not understand) the scope and bearing of the drawings and specifications and contract which they had accepted as binding.

Without evidence of some disqualifying misconduct or bad faith, etc., I can see no reason for setting aside the decision of the engineer.

I think his finding on all the matters in difference very fully and clearly appears. He was made fully aware of

Judgment.

HAGARTY,
C.J.O.

Judgment. all plaintiffs' arguments and demands. A long correspondence was in evidence, full examination of the work by the assistant engineer, and plaintiffs pointing out their claim as substantially being that the red line in their view shewed the line they were to grade to, while the defendants interpreted it as indicating the top of the block.

HAGARTY,
C.J.O.

The true position of the referee in a building or other contract is very fully declared in a line of authorities from the leading case in the House of Lords of *Ranger v. Great Western R. W. Co.*, 5 H. L. C. 72.

Lord Cranworth points out that the contract did not hold out or pretend to hold out that contractors were to look to the chief engineer in any other character than as the impersonation of the company; that the engineer was not intended to be an impartial judge, but the organ of one of the contending parties; that it was not necessary to enquire minutely how far his calculations were accurate; it was enough that they were made *bond fide*, and made with the intention of acting according to the terms of the contract: *Goodyear v. Mayor of Weymouth*, Har. & Ruth. 67, 35 L. J. C. P. 12; *McIntosh v. Great Western R. W. Co.*, 2 DeG. & Sm. 758; *Connor v. Belfast Commissioners*, 5 Ir. Rep. C. L. 55 (1871); *Lapthorne v. St. Aubyn*, 1 C. & E. 486, where it is said the builder and the owner put themselves "under the thumb of the architect," and both were equally bound by his decision in the absence of fraud or collusion. Each agrees to be content with what the architect may consider fair: *Clarke v. Watson*, 18 C. B. N. S. 278. In Jenkins & Raymond's work on the Duty of Architects *Laidlaw v. Hastings Pier Co.*, and *Bateman v. Thompson*, are given, not elsewhere reported. *Martinsburgh R. W. Co. v. March*, 114 U. S. 549, and other American cases, may be referred to.

These cases, with many others, are cited in the judgment of this Court in the last case of *Conmee v. Canadian Pacific R. W. Co.*, not reported, and now said to be settled.

I think the law is clear that in the absence of fraud or collusion, etc., the engineer in this case had, under the con-

tract, the right to decide on the plaintiffs' claim, and did so decide. And see also the very recent case of *Jackson v. Barry R. W. Co.*, 9 Times L. R. 90.

Judgment.

HAGARTY,
C.J.O.

Irrespective of this legal obstacle to the plaintiffs' recovery I must say that I cannot see how they could have succeeded on the general merits of the claim.

I do not think that *Green v. Orford*, 16 A. R. 4, affects this case, and that my learned brother was right in dismissing this action, but not on the authority of that case.

BURTON, J. A. :—

I do not think any such question arises here as was discussed in *Green v. Orford*, 16 A. R. 4.

The sole question is, was the work, the price of which is now sought to be recovered, embraced within the contract ?

[The learned Judge discussed the evidence at length, coming to the conclusion that the work in question was included in the contract, and covered by the contract price.]

I have come to this conclusion without reference to the clause of the contract which makes the production of the engineer's certificate a condition precedent to the plaintiffs' right to recover, no case having been made out to impugn his conduct or impartiality.

I never felt less hesitation than I do in this case in holding that the plaintiffs' action should be dismissed.

OSLER, J. A. :—

[The learned Judge discussed the evidence and continued:]

I am of opinion that the plaintiffs are bound by the terms of their contract and specifications. The correspondence shews that the dispute was raised, that the plaintiffs made their claim in respect of it, and that the engineer decided it adversely to them. They are bound by his decision, for this was a matter coming precisely within the terms of the 48th clause of the specifications.

Judgment.

OSLER,
J. A.

The case of *Lawson v. Wallasey Local Board*, 11 Q. B. D. 229; 48 L. T. N. S. 507, cited in the judgment below as shewing that there had been no reference to the engineer, but only a negotiation with him treating him as an agent for the corporation, is, with all respect, not quite applicable, for there the engineer had undertaken to decide something that had not been referred to him, and which, without a reference in the manner provided by the Common Law Procedure Act, he would have had no jurisdiction to decide. The terms of this contract are very different. The engineer's powers are to decide upon disputes, as they arise, upon claims made by the contractors whether as to interpretation of the contract, measurements, extra work, quality, quantity, and all other matters and things which may be in dispute. These powers, it appears to me, he undoubtedly exercised in reference to the very matters now in question. I cannot agree that there was here anything to disqualify the engineer from acting upon these referential clauses of the contract. His position is very different from that of the ordinary arbitrator, as is very aptly put by Bowen, L. J., in the recent case of *Jackson v. Barry R. W. Co.*, 9 Times L. R. 90: "To an adjudication in such a peculiar reference, the engineer cannot be expected, nor was it intended, that he should come with a mind free from the human weakness of a preconceived opinion. The perfectly open judgment, the absence of all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked for, neither party to the contract proposed to exact from the arbitrator of their choice. They knew well that he possibly or probably must be committed to a prior view of his own; and that he might not be impartial in the ordinary sense of the word. What they relied on was his professional honour, his position, his intelligence." I do not think that the position of the engineer in this case can justly be compared to that of the architect in *Kimberley v. Dick*, L. R. 13 Eq. 1, where the latter had, without the knowledge of the contractor, committed himself to an undertaking with his

employer that the building should not cost more than a named sum.

Judgment
OSLER,
J.A.

So in *Kemp v. Rose*, 1 Giff. 258, the architect had not only made an estimate of the cost, but had accompanied it with an opinion that the contract should not exceed that amount.

I refer also to Hudson on Building Contracts, p. 290, in which these cases and similar cases from the Scotch courts are cited.

Here we have nothing but the plaintiffs' tender, the contract, the profile and the specifications. The engineer had, I suppose, his own view, which he never receded from, of what the plaintiffs were undertaking to perform; and if he had known when they were entering into their contract, that they understood it differently and had concealed his own view, I have no doubt they could justly have objected to his afterwards enforcing it against them. Clearly it would then have been his duty to have explained to them his own view of its meaning. But that is not the evidence. If that could have been made out it would have brought the case more clearly within the principle of the cases referred to. Here the difference of opinion as to the meaning of this contract arises for the first time when the plaintiffs are insisting upon their own construction of it; and that is exactly one of the differences for the decision of which the contract provides. It was contended that the engineer, from his desire to stand well with his employers and to avoid the admission that he had made a mistake, was necessarily so biased in favour of, or committed to, the support of his own opinion that he could not decide impartially between his employers and the contractors. That, however, is just the bias of which the contractors under conditions of this kind always take the risk; and if the engineer's power to act under them was to depend upon whether the Court might afterwards agree with his opinion they might as well be omitted.

To release the contractor on such a pretext would be, as Bowen, L. J., says in the case just cited: "to dissolve his

Judgment.

OSLER,
J. A.

obligations under the contract, and to substitute, by force of the power of this Court, a wholly different and far more agreeable kind of arbitrament before either some stranger or a jury of strangers—a tribunal which it was the express object of this contract to exclude.”

For these reasons I think the judgment should be affirmed and the appeal dismissed.

MACLENNAN, J. A., concurred with HAGARTY, C. J. O.

Appeal dismissed with costs.

WALKER V. DICKSON ET AL.

Mortgagor and Mortgagee—Indemnity—Meme purchasers—Parties—Practice.

The equitable doctrine of the right to indemnity of a vendor of land sold subject to a mortgage applies only as against a purchaser in fact, and therefore where at the request of the actual purchaser the land in question was conveyed to his nominee by deed absolute in form, but for the purpose of security only, this nominee was held not liable to indemnify the vendor.

It is not proper in an action for foreclosure to join as original defendants the intermediate purchasers of the equity of redemption, and to order each one to pay the mortgage debt and indemnify his predecessor in title.

Application of Consol. Rules 328, 329, 330, 331, 332, 333, discussed.
Lockie v. Tennant, 5 O. R. 52, approved.

Judgment of the Common Pleas Division reversed.

Statement. THIS was an appeal from the judgment of the Common Pleas Division.

The plaintiff was mortgagee of certain property in Toronto under a mortgage made by the defendant Dickson to one Scott, assigned to the plaintiff, and brought the action against Dickson, Rogers, and Milburn asking payment and in default sale. Dickson, after making the mortgage, sold to the defendant Rogers in consideration of the assumption of the mortgage in question and a prior mortgage and other consideration; and Rogers after—

wards conveyed the land to the defendant Milburn, sub- Statement.
ject to the mortgages. Rogers had however in fact sold the land to one Collins, who at the time was indebted to Milburn, and directed the conveyance to be made to Milburn in effect as mortgagee. In the statement of claim the chain of title was set out, and it was alleged that the defendant Milburn was entitled to the equity of redemption in the lands, and the plaintiff claimed (1) payment of the mortgage moneys and interest and costs, and in default sale of the lands; (2) that the defendant Dickson might be ordered forthwith to pay to the plaintiff the mortgage moneys and interest and costs; (3) that the defendant Milburn might be ordered forthwith to deliver to the plaintiff possession of the lands; and (4) that all proper directions might be given and accounts taken. The defendant Dickson in his defence admitted the making of the mortgage, and set out the facts connected with the sale of the land by him to Rogers, and the latter's agreement to indemnify and save him harmless against payment of the mortgage in question, and he claimed indemnity against Rogers and payment by him of the mortgage moneys and interest. Rogers in his defence admitted that he was liable to indemnify Dickson, but set up the conveyance by him to Milburn, alleging that the consideration therefor was in part the assumption by Milburn of the mortgage in question; and that the intention was that Milburn should indemnify him against payment thereof. He then claimed indemnity against Milburn and payment by him of the mortgage moneys and interest. Milburn made no defence to the plaintiff's claim, but pleaded as against Rogers that the conveyance was in fact made to him merely as mortgagee, and in pursuance of an agreement between Rogers and one Collins; that Rogers made his claim for indemnity against Milburn at the request of Dickson, and that both of them knew the true facts, and he claimed payment of his costs from the defendants Dickson and Rogers.

Upon the application of Rogers an order was made by

Statement. the Master in Chambers directing that the issue between Rogers and Milburn should be tried and disposed of at the same time as the plaintiff's claim in the action. This order was set aside by Galt, C. J., on appeal, but was restored by the Queen's Bench Division. See 14 P. R. 343.

The action was tried at Toronto, on the 26th of April, 1892, before BOYD, C., who gave judgment in favour of the plaintiff, ordering (1) in the usual way payment in six months' time, or in default sale; (2) the three defendants to forthwith pay to the plaintiff the mortgage moneys and interest due at the date of the judgment, and the costs of the action; (3) the defendant Milburn to forthwith deliver up possession; (4) the defendants Milburn and Rogers to pay to the defendant Dickson his costs of suit; (5) the defendant Milburn to pay to the defendant Rogers his cost of suit; (6) if Dickson should be compelled to pay the mortgage debt to the plaintiff, the defendants Rogers and Milburn to forthwith pay the same and accrued interest thereon to Dickson, together with his costs of suit; and (7) if the defendant Rogers should be compelled to pay to the plaintiff the mortgage debt, or to the defendant Dickson the mortgage debt and his costs or either of them, then the defendant Milburn to forthwith pay the same and accrued interest thereon to the defendant Rogers, together with costs of suit.

On appeal by the defendant Milburn to the Common Pleas Division this judgment was affirmed with costs.

The defendant Milburn appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 29th and 30th of November, 1892.

Moss, Q. C., and G. B. Gordon, for the appellant Milburn. The judgment against Milburn is without justification. Not only is the frame of the action technically wrong but there is no right whatever to order Milburn to indemnify Rogers, and there is certainly no right to order Milburn to

pay to the plaintiff the amount of the mortgage debt. **Argument.**
The equitable right of indemnity arises in favour of a vendor only as against an actual purchaser. Milburn, as Rogers knew, was really merely a mortgagee of Collins, the actual purchaser, and no right of indemnity arose as against Milburn: *Waring v. Ward*, 7 Ves. 332. The equitable obligation attaches to the vendee and to him only: *Ashby v. Jenner*, 32 Sol. J. 576. The agreement between the actual purchaser Collins and Milburn as mortgagee cannot affect or extend the equitable right of the vendor: *Corby v. Gray*, 15 O. R. 1. This equitable right of indemnity is not an absolute irrebuttable obligation arising from the mere fact of the conveyance. It depends on the actual facts and the rule never went further than this that when a person actually purchases, enters into possession and is in receipt of the rents and profits, then the implied equity to indemnify his vendor against the assumed encumbrance arises: *Frontenac Loan and Investment Society v. Hyslop*, 21 O. R. 577; *Aldous v. Hicks*, 21 O. R. 95; *Campbell v. Robinson*, 27 Gr. 684. Such an obligation could not attach to one who was not in truth the purchaser, but was holding only as a trustee: *Patterson v. McLean*, 21 O. R. 221. *Waring v. Ward*, 7 Ves. 332, was considered in *In re the Law Courts Chambers Co.*, 61 L. T. N. S. 669, and was limited to cases where in fact the relationship of debtor and creditor existed. See also *Williams v. Balfour*, 18 S. C. R. 472. There was no privity whatever between the plaintiff or Dickson and Milburn, and the personal order for payment by Milburn was in no sense necessary to work out the plaintiff's remedies, and was improper: *Lockie v. Tennant*, 5 O. R. 52; *McMichael v. Wilkie*, 18 A. R. 464.

Bain, Q. C., and *Kappele*, for the respondents Dickson and Rogers. The objections taken by the appellant are merely of a formal and technical character, and should not be given effect to. Even admitting that there are technical objections to the frame of the action, still in substance the relief granted is right. Milburn is bound to indemnify Rogers, and Rogers is bound to indemnify Dickson,

Argument. against whom the plaintiff is of course entitled to immediate payment; and by directing Milburn to pay to the plaintiff circuity of action and delay and expense are avoided. The only real question is as to the issue between Rogers and Milburn. As to this the decision is right. The conveyance from Rogers to Milburn is in itself sufficient evidence of the intention to indemnify, and there is nothing whatever to rebut the presumption arising on the face of the conveyance. It is not because the purchaser gets anything out of the property that he becomes bound to pay the encumbrance. It is because he takes the property subject to the encumbrance. The very cases cited by the appellants put it in this way. The obligation arises *quod* purchaser, and that means purchaser in law, that is, the person to whom the property is conveyed. So far as Rogers is concerned, he conveyed to Milburn out and out, and any equity between Milburn and some third person cannot affect the question, even assuming that Rogers had knowledge of that equity. Milburn may have a right as against Collins but Rogers has nothing to do with that, and the conveyance to Milburn gives rise to the equity of indemnity. Milburn is, as far as the registered title is concerned, the owner of the equity of redemption and is the necessary party, and not Collins, who had no right to redeem except through Milburn: *Boyd v. Johnston*, 19 O. R. 598. The form of action is proper: Con. Rule 328, but if not, the order directing the trial of the issues between the co-defendants has not been appealed against and cannot now be complained of.

Haverson, for the plaintiff, submitted that the plaintiff should not be held responsible for the difficulties that had arisen in consequence of the disputes between the defendants.

Moss, Q. C., in reply. The plaintiff improperly joined the intermediate purchasers as defendants, and thus allowed the unnecessary issues to be raised and the judgment to be taken out in its present improper form, and cannot now escape responsibility. Collins is a necessary party to the

action. A trustee does not represent his *cestui que trust* Argument.
in a mortgage action unless the trustee has funds in his hands sufficient to pay off the encumbrance.

December 24th, 1892. BURTON, J.A.:—

This case discloses what, to my old fashioned notions, appears to be a very strange and, I think, a very objectionable practice. The action is one for foreclosure or sale, the only necessary parties to which were the plaintiff, the mortgagee, Dickson the mortgagor, and the person who was at the time of action brought the owner of the equity of redemption.

In such a suit the judgment or decree would be for a personal order against the mortgagor, and in default of payment an order for sale and an order for possession against the owner of the equity of redemption.

Milburn, having no answer against the mortgagee's claim, suffered judgment to be noted against him by default, but the intermediate owner of that equity, that is to say, a person who had at one time owned the equity of redemption, was most unnecessarily and improperly, as I think, made a defendant, and one cannot avoid a strong suspicion that the suit as constituted was so constituted to enable Dickson and Rogers, in the plaintiff's action, to set up their respective claims to indemnity so as eventually to fix the defendant Milburn with a personal liability.

They have so far succeeded in this that the proceedings have resulted in a judgment, by which not only Dickson but Rogers and Milburn are ordered to pay to the plaintiff the full amount of the mortgage money, interest and costs.

This is manifestly erroneous, and the plaintiff did not pretend to support it.

The judgment proceeds to direct Rogers and Milburn to pay to Dickson his costs of suit, which as regards Milburn is also erroneous.

The remaining portions of the judgment are also erro-

Judgment.
BURNES,
J.A.

neous in directing Milburn to pay to Dickson, with whom he is in no privity, the amount of the mortgage and costs in the event of his paying the same.

Milburn, if liable at all, can only be liable to Rogers; and the substantial question on this appeal is, whether he is liable even to him.

It is familiar law, scarcely at this day requiring a reference to authorities, that where a person purchases an estate which is subject to a mortgage, meaning at the time of the contract to buy the estate subject to that encumbrance, he is liable in equity to indemnify his vendor against the encumbrance; it is in effect part of the purchase money. But Mr. Bain attempted to carry the doctrine very far beyond the decided cases, and contended that the bare fact that there is a deed absolute on its face from the defendant Rogers to the appellant brings the latter within the rule applicable to the ordinary position of a purchaser buying an estate *cum onere*.

I trust that the law is not in so unsatisfactory a state, and I think a very little reflection will shew that it cannot be so.

The person to be affected by such an equity must be a purchaser, he must necessarily have intended to indemnify his vendor; in such a case the original mortgage becomes part of the purchase money.

It is said there is a conflict of evidence between Milburn and Rogers; if material, I should have no hesitation in preferring that of Milburn, supported as it is by the evidence of Collins and the documentary evidence and other facts, to that of Rogers, which reads very badly and is frequently contradictory. But it appears to me to be perfectly immaterial which is adopted; the undisputed fact remains that there was a contract of sale proved between Rogers and Collins, who became in equity the owner of the equity of redemption, and according to *Ashby v. Jenner*, 32 Sol. J. 576, came within the rule laid down in *Waring v. Ward*, 7 Ves. 332, but if he did not, it was Rogers' folly in not insisting on an express covenant from him if he wished

any security from him. The appellant, whether he was mortgagee of Collins or purchaser from Collins, was under no liability to Rogers and never intended to become liable to him.

Judgment.
BURTON,
J.A.

If, as I think the evidence clearly establishes, he was mortgagee of Collins, it is very obvious that he could be under no obligation to indemnify his debtor against any prior encumbrances; if on the other hand he took the property in satisfaction of his debt from Collins, of which I think there is no proper evidence, then his liability would be to Collins alone, not to Rogers.

If the transaction had been carried out in the usual way there would have been a deed to Collins, and a mortgage from him to Milburn. It would be a strange travesty of justice, if by reason of the conveyance having been made at the request of Collins to the appellant, in order to secure his advance, he should be treated as a purchaser from Rogers, and bound to indemnify him.

To quote from Mr. Justice Ferguson, in the case of *Corby v. Gray*, 15 O. R. 1, to permit Rogers to recover against the appellant in respect of this supposed or alleged indemnity would not only be, in my opinion, quite unjust, but entirely contrary to what was intended at the time the deed was made.

There is no evidence of any trust beyond that ordinarily existing between a mortgagee and a mortgagor—it is an ill advised expression, but it ought not to affect the decision of this case on the merits.

It is sufficient, in my opinion, to say that upon the facts in evidence no such equity as is claimed ever arose.

I am of opinion, therefore, that the appeal should be allowed, and the personal order as to Milburn discharged.

As to the plaintiff, his disclaimer of responsibility for the form of this decree comes, I think too late, but the original minutes, when produced on the argument, appear to have been prepared in the office of the plaintiff's solicitor. I think the appellant should have his costs as against the plaintiff and all the other parties to the action.

Judgment. MACLENNAN, J. A. :—

MACLENNAN,
J. A.

Milburn's counsel appears to have made no objection at the trial to being compelled to litigate Rogers' claim against him in this action, and no objection was made by the plaintiff or any of the other parties. Besides voluntarily filing a statement of defence against Rogers' claim specially so designated, Milburn appears to have acquiesced in the order of the Queen's Bench Division, and to have made no further opposition to the mode of trial which was thus forced upon him. But for this acquiescence, and what may be called consent, on his part, I should have thought it clear that the trial of the question of indemnity in this action was irregular and unauthorized. It is clear that Con. Rules 329, 331, and 332, are inapplicable, because they are intended for the case of persons who are not parties to the action. It is equally clear that before the Judicature Act no such issue between co-defendants could be tried, because its determination was not necessary in order to the relief sought by the plaintiff. If it had been, then it would be necessary and proper to determine it : *Chamley v. Lord Dunsany*, 2 Sch. & Lef. at p. 718. The only authority that can be invoked for such a trial must be Rules 328 and 330, but it is evident that the only questions which could be tried under these rules between the co-defendants are, whether the plaintiff was mortgagee, and what, if any, sum was due upon the mortgage. These are the only questions in the action in which Rogers could have any concern. The cases are not all consistent, but I think *Lockie v. Tennant*, 5 O. R. 52, decided in 1884, in the Queen's Bench Divisional Court, expresses the true result of the decisions of the Court of Appeal in England, as well as the true sense and meaning of the rules. The late Chief Justice Wilson had come to a different conclusion in *Neald v. Corkindale*, 4 O. R. 317, shortly before the decision in *Lockie v. Tennant*. Besides the authorities reviewed by the Chief Justice in *Lockie v. Tennant*, I refer to a judgment of the Court of Appeal, *Swansea Shipping Co.*

v. *Duncan*, 1 Q. B. D. 644, in which the true purpose of the rules in question is clearly pointed out.

Judgment.
MACLENNAN,
J.A.

Here, however, as I have already said, the parties have virtually consented to the trial in this action of the issues of indemnity raised by and between the co-defendants, and that being so, I think no objection can be raised at this stage of the action. In *Murner v. Bright*, cited in a note to *Bagot v. Easton*, 11 Ch. D. 392, Jessel, M. R., said in 1878, that he had several times made orders for the trial of issues between defendants which were germane to and connected with the matters in dispute, but with which the plaintiff had nothing to do; but that he only did so by consent. That shews that when there is consent, such trials may without impropriety be had.

It is necessary, therefore, to consider the main question whether the learned Chancellor's decision is right in making the defendant Milburn liable to indemnify Rogers against the mortgage, and I am with great respect of opinion that the decision cannot be supported.

What took place was this: On the 18th April, 1890, a written contract of sale of the land in question was made between Rogers and John Collins. The contract is produced and proved, and there is no possible doubt on the evidence that the purchase was for the sole use and benefit of Collins, and that he was the real purchaser, the real person to whom Rogers sold, and to whom he became bound, and who became bound to him. There was no transaction whatever between Rogers and Milburn. The land came to Milburn solely by reason of the transaction between himself and Collins. Nothing is better settled than that a purchaser is entitled to have the conveyance made to his appointee instead of to himself, and decrees for specific performance are always so drawn up. It is no concern of the vendor to whom the purchaser requires it to be made. In making it to the appointee, he is performing his contract with the vendee just the same as if he made it to himself. In doing so he is still dealing with his vendee. If that be so, it seems to follow, and I think

Judgment. it does, that the right of indemnity against a mortgage on the estate arises from the sale and not from the mere conveyance, and must be against the real vendee, and not against the person to whom the conveyance has afterwards been made. It is an equitable and not a legal right, and it is in the nature of a personal obligation on the purchaser not depending in any way on the legal title. The purchaser might take the conveyance to himself, and immediately afterwards convey the land away, but the obligation would remain. How can it make any difference, that instead of doing that he requests the vendor to convey directly to a third person?

**MACLENNAN,
J.A.**

If the right of indemnity were a legal right, then the legal title alone would be regarded, and there would be no right until conveyance; whereas this right arises upon the making of the contract. A sale may be made subject to a mortgage which is to be due in a short time; the purchase money may be payable by instalments extending over several years, and no conveyance to be made until they are paid. It cannot be doubted that the vendor could compel the purchaser to pay the mortgage when due without waiting until the conveyance was made. In equity it is the contract which is the sale of the land, and for the purpose of this equitable obligation of indemnity it is the sale, that is the contract of sale, which gives rise to it, and therefore when Collins bought this land from Rogers by a contract in writing, he then became, and he alone became, liable to indemnify the latter. No doubt if the case had been that the contract between Rogers and Collins had been abandoned, and then the former had conveyed to Milburn, the conveyance would have been the sale and the latter would have been liable, but that is not what took place. Milburn never was, and never intended to be, a purchaser, nor anything more than a mortgagee, and I think we must therefore hold that he is not liable to indemnify Rogers, and that to that extent the appeal should be allowed.

It is clearly proved that Milburn is a mere mortgagee and not the owner of the equity of redemption, that

person being Collins. The plaintiff has unfortunately not brought the owner of the equity of redemption before the Court, and therefore the judgment, so far as it directs a sale of the land, can be of very little value. Milburn has not even the legal estate, although the deed to him is absolute in form, that being in the first mortgagees, the People's Loan Company.

Judgment.
MACLENNAN,
J.A.

The judgment, however, with the exception of Milburn's personal liability, must stand for what it is worth, and we cannot disturb the personal judgment of the plaintiff against the other defendants, or the judgment of indemnity as between themselves.

The appeal should therefore be allowed with costs; and there should be judgment with costs for Milburn in the Courts below of the issue between him and Rogers, the costs to be paid by the latter.

The judgment is also wrong as to possession, for it was proved that Collins, and not Milburn, is in possession.

HAGARTY, C.J.O., and OSLER, J.A., concurred.

Appeal allowed with costs.

BASKERVILLE v. CITY OF OTTAWA, ET AL.

BASKERVILLE v. CANADA ATLANTIC R. W. CO.

Municipal corporations—Arbitration and award—Damages—Ways—Railways—R. S. O. ch. 184, sec. 531, sub-sec. 4.

A railway company obtained permission from a municipal corporation to run their line along a certain street, agreeing not to raise the grade to more than a certain height. They built the line and raised the grade of the street to more than the specified height, the corporation not consenting, but not taking any steps to prevent the violation of the agreement :—

Held, affirming the judgment of MACMAHON, J., that as against the plaintiffs, who were owners of property injuriously affected by the unauthorised raising of the grade, the railway company were liable in an action for damages ; but—

Held, also, reversing the judgment of MACMAHON, J., [MACLENNAN, J. A., dissenting] that as against the corporation the plaintiffs were restricted to the remedy by arbitration, and that in any event the cause of action was not of such a nature as to entitle the corporation to bring in the railway company under section 531 (4) of R. S. O. ch. 184.

Statement.

THESE were appeals from two judgments of MACMAHON, J.

The plaintiffs were owners of certain property fronting on a street in the city of Ottawa, called Britannia Terrace, and in the year 1885 they erected some buildings on their property, first obtaining from the city engineer the grade above which the street was not at any time to be raised. In 1885 the railway company filed amended plans showing their intention to enter the city of Ottawa in a course which would for some distance run along Britannia Terrace, and on the 5th of April, 1886, the city, for valuable consideration, entered into an agreement with the railway company as to the construction of the line, the material clauses of that agreement being as follows :—

11. That the proposed crossing over Britannia Terrace shall not be raised over six feet above the present level of the roadway, and the terrace for its full width on both sides of said crossing shall be properly graded and macadamized by the said parties of the second part (the railway) to an inclination of not more than one in a hundred, and in case the track or switches pass parallel to the said Britannia

Terrace and it is found necessary by the parties of the second part to encroach with their embankments on said terrace, they will fill in properly with suitable material, and to the satisfaction of the city engineer, the full width of the roadway of Britannia Terrace to the grade marked on the hydrants now placed on said terrace. The parties of the second part will also furnish and provide proper crossings at any points deemed necessary by the city engineer. Statement.

15. The said parties of the second part hereby further covenant and agree with the parties of the first part that they shall and will indemnify and keep indemnified the said parties of the first part, and all the officers, servants and agents of the parties of the first part from all and all manner of damage, loss, expense, suits, claims and demands arising out of or that any person or persons may have in consequence of the permission hereby given or in consequence of any of the works hereby agreed to be performed (excepting changes, or alteration of grades) or in consequence of the breach of any of the covenants hereinbefore specified.

In 1888 the railway company constructed their line along Britannia Terrace, and in so doing raised the grade several feet above the limit fixed by the city engineer, and referred to in the agreement, the city not authorising this departure from the agreement but taking no steps to restrain the railway company from its violation. The result of so raising the grade was that access to the plaintiffs' property was materially interfered with and water was caused to flow and accumulate on the property. On the 7th of May, 1889, after the completion of the work, the plan and profile of that portion of the line in question was approved by Order in Council.

On the 23rd of November, 1888, the plaintiffs brought the action against the railway company claiming damages. The plaintiffs contended that they were also entitled to recover damages from the city, and on the 3rd of February, 1890, they appointed an arbitrator to determine the con-

Statement. pensation to which they alleged they were entitled and gave notice of the appointment to the city who referred the matter to their solicitor. On the 2nd of October, 1890, the city solicitor wrote to the solicitor for the plaintiffs stating that a by-law for the appointment of an arbitrator in the matter had been prepared by him but had not yet been considered by the council. On the 20th of October, 1890, the plaintiffs' solicitor wrote to the mayor urging the advisability of appointing an arbitrator without further delay but nothing was done by the city, and on the 20th of December, 1890, after the pleadings in the action against the railway company had been closed, the plaintiffs brought the action against the city claiming damages against them for the same cause of action. On motion of the city in this action the railway company were added by the local Judge as parties defendants under R. S. O. ch. 184, sec. 531 (4), liberty being given to the plaintiffs to amend their statement of claim as they might be advised, and this order was affirmed after an appeal by the railway company. The city then delivered a defence denying the acts and matters complained of and all charges of negligence; placing all responsibility on the railway company, and claiming indemnity from them. The railway company also put in a defence pleading that the plaintiffs' remedy, if any, was against the city by arbitration under the Municipal Act, or if by right of action, then at all events without any remedy over by the city under section 531 (4) of the Municipal Act, R. S. O. ch. 184; that as against the railway company the plaintiffs' remedy, if any, was by arbitration under the Railway Act, and that if any right of action had ever existed it was barred by R. S. C. ch. 109, sec. 27. The plaintiffs did not amend their statement of claim in any way but simply joined issue upon the statement of defence of the city and the city thereupon joined issue upon the statement of defence of the railway company.

The actions were tried together at Ottawa on the 6th of May, 1891, before MACMAHON, J., who on the 21st of August, 1891, gave judgment dismissing the action as

against the railway company alone with costs down to and including the costs of the notice of trial, holding that all necessary relief could be given in the second action. In that action he gave judgment for the plaintiffs against both defendants with costs, holding that they were joint tortfeasors, and directed a reference to the Master to ascertain the damages, with a proviso that should the city pay the damages and costs they should be entitled to recover the amount paid, together with their costs of defence, from the railway company. Statement.

The city and the railway company appealed in the second action and the plaintiffs appealed in the first action, and both appeals were argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 11th of October, 1892.

J. H. Macdonald, Q. C., and A. J. Christie, Q. C., for the railway company.

D. B. McTavish, Q. C., and Aylesworth, Q. C., for the city.

McCarthy, Q. C., and F. R. Latchford, for the plaintiffs.

December 24th, 1892. HAGARTY, C. J. O.:—

I was for some time of opinion that the learned trial Judge rightly held both the city and the company liable.

The city had full control over the streets to raise and lower them as they thought proper, subject to the usual claims of property owners for compensation or damages as the case might be. They make this agreement with the railway company with the six feet restriction. The company do this work, but exceed the prescribed grade to the plaintiffs' injury. They apparently make no attempt to prevent this excess or to restrain the company, as they might have done, from exceeding their contract. They take an indemnity from the company against all claims and damages, and they persistently neglect the plaintiffs' request or demand

Judgment.

HAGARTY,
C.J.O.

for redress. They attempt to shift all blame and claim for redress to the company, as being wholly the fault of the latter, and it seemed at first to me that they could not thus escape from their primary responsibility to property owners. The wrong causing injury to the plaintiffs cannot be justified by the railway company under the permission from the city. They put this unlawful erection on the street, and must be liable therefor.

I think the learned Judge was right in rejecting any defence under any order of the Privy Council, obtained, as he points out, long after the obnoxious work was done, even if it affected to approve of a raising of the grade over the specified height.

The company in their defence rest on the city's express permission "to cross the said highway called Britannia Terrace, and to build a line of railway across said highway," and that under such agreement they found it necessary to encroach with their embankments on said terrace, and that they filled in properly the full width of the roadway to the grade agreed, expressly denying that they had exceeded such agreed grade.

That they did so exceed was fully proved, and that such excess was the whole cause of injury.

They also claim generally all rights granted to them under the Railway Act, 1879.

It has been suggested that the company merely exercised their statutable powers to cross a street.

No such objection appears in the reasons of appeal. Even if open to the defendants I cannot think on the evidence before us the general statutable provisions to cross highways in the line of the railway can warrant the course taken by the defendants. The company's engineer says that they were compelled to take the course they did in dealing with the terrace and in crossing it because of the agreement with the city, that their so doing was not an engineering necessity, but that under the agreement it was the only practicable way.

Mr. Lewis' evidence shews, I think, distinctly the manner

in which the company crossed and returned to the terrace, and their dealing with this highway does not, in my judgment, seem under these special circumstances a fair exercise of any statutable right they possessed.

Judgment.
HAGARTY,
C.J.O.

I consider it as a user of the street, not a mere ordinary crossing.

But I find insuperable difficulty in holding that the city is liable to the plaintiffs' action, and I have finally come to the conclusion that their only remedy must be for compensation under the general law as to property injuriously affected.

It must be borne in mind that this case does not shew any obstruction on or to the highway.

It is clear on the evidence that the street has been very much improved, and that as a highway it is more commodious and useful to the general public (including the plaintiffs) than it was before.

The jurisdiction and right of the city to deal with the street in the raising or lowering of the grade is undoubted and in such circumstances as are here presented cannot be a wrong to be redressed by action.

But a special injury may be caused in this execution of these admitted powers to individual proprietors on the street in their reasonable right to use the highway, and as in this case, interfering with the ingress and egress.

So the Legislature have provided a remedy "for any damages necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work," to be settled by arbitration. No delay or refusal by a municipality to appoint an arbitrator can convert the plaintiffs' claim for compensation into a right of action.

If the city had done all this work under its general powers, raising the street to its present height, I think the remedy would not be by action.

This conclusion leaves untouched any question as to the city's liability after notice for the acts of strangers in passing.

Judgment.

BURTON,
J.A.

highway, except with the permission of the municipality. That permission was to place it upon the highway when graded to the level referred to in the agreement; instead of which the company has raised the grade beyond that level, and are there now without authority. This is sufficient in itself to make them tortfeasors; but apart from that, the preliminaries required by the Railway Act, where land is injuriously affected, were not complied with. I think therefore that the judgment dismissing the plaintiffs' action should be reversed, and judgment entered for the plaintiffs with a reference to ascertain the damages.

OSLER, J. A. :—

BASKERVILLE V. CANADA ATLANTIC R. W. Co.

Section 74 of the Railway Act of 1886, forbids (in the case of a railway not already constructed) the construction of any portion of a railway upon, along, or across a street or other public highway on the level or otherwise, before the submission by the company to the Railway Committee for its approval of a plan or profile of such portion of the railway.

This approval the company had not obtained prior to the execution of the work in question.

They had filed a plan and profile of this portion of their railway and had given public notice thereof according to law, and so far had probably acted within their powers in placing themselves in a position to execute this part of their works under the Act, as being a deviation within the statutory limits, R. S. C. ch. 109, sec. 6, sub-secs. 3, 16; sec. 7, sub-secs. 11 and 12: *Kingston and Pembroke R. W. Co. v. Murphy*, 17 S. C. R. 582, for I think this was a deviation within the meaning of section 7, sub-sections. 11, 12, and not an alteration in the line or course of the railway within sub-sections 7, 8, of that section which required the approval of parliament. Inasmuch, however, as the defendants had not taken any proceedings to have the com-

pensation, to which any one affected by the work if done in the execution of the powers of the railway would be entitled, ascertained and paid, they cannot rely upon these clauses of the Act: *Parkdale v. West*, 12 App. Cas. 602.

That the company had power to enter the city of Ottawa, and construct their line of railway there, subject to compliance with the law in other respects, I may refer to *In re Bronson and Ottawa*, 1 O. R. 415, the views expressed in which case have not been contested in this case, and to which I adhere.

It appears to me, therefore, that the defendants, not being able to justify the raising of the grade of the street for the purpose of building the railway thereon under any statutory power or authority which they were exercising on their own behalf, must rely for their justification, as by their pleadings they do rely, solely upon the authority they derived under the agreement into which they entered with the city. That the city might in the exercise of their corporate powers and for the purpose of grading the street have done the very work which the defendants have done, subject to the right of the plaintiffs to compensation for the damage caused thereby, to be ascertained by arbitration under the Municipal Act, will not be denied: *Yeomans v. Wellington*, 4 A. R. 301; *Pratt v. Stratford*, 16 A. R. 5. So far therefore as the defendants were acting within, or substantially within or in execution of the authority which the agreement purports to confer, I cannot see that they occupy a position fairly distinguishable from that of contractors for the corporation. To the extent to which changes of grade were authorized, the work though immediately for the purposes of the railway company, was also the work of the corporation done for them by the railway company now, instead of at some future time by themselves. Clearly it was in their contemplation to change the grade on Britannia Terrace as well as on other streets, and the terms of the indemnity clause shew that the work of the company in that respect is assumed to be that of the city corporation, inasmuch as damages arising

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

out of or caused by changes or alterations of grades are excepted from those against which the railway company agree to indemnify them. To the extent of the authority thus conferred it seems to me clear that the railway company have the right to defend what they have done as an exercise of the statutory powers of the city corporation, leaving the plaintiffs to their statutory remedy. But it has been found by the learned trial Judge, and the evidence appears to me fully to warrant the finding, that the railway have raised the grade of the streets several feet in excess of that which the agreement authorized, and therefore to the extent to which the plaintiffs' damage is caused by that excess, whether it be by making access to and from the premises more inconvenient or by causing water to flow thereon, the defendants appear to be wrongdoers, and without any answer to the action. All the work that was not authorized by the agreement they did for their own convenience and advantage and not for the corporation. The fact that the corporation have not removed it and lowered the grade, cannot be relied upon by the railway company as an acceptance or approval of it so as to enable them to defend themselves as having done it by their authority. The corporation may well determine to maintain the street in its present condition because *quid* street or highway it is an improvement, and a well constructed work. But that cannot condone the wrong done by the railway company to the plaintiffs by its construction.

It does not appear from the judgment of the learned trial Judge why the action against the railway company was dismissed, as he held that they were wrongdoers. It may have been because he was of opinion that all the damage should be recovered in the action subsequently brought against the city, in which at the instance of the city the railway company were brought in as co-defendants, and which was tried with this action, though the plaintiffs sought no relief therein against the company, and indeed expressly disclaimed it. I think with all respect that the plaintiffs were entitled to judgment to recover the damages from the

railway company, to be assessed on the principle acted upon by the Privy Council in *Parkdale v. West*, 12 App. Cas. 602, the injury committed being of a complete and permanent character, and the defendants having since the commencement of the action obtained from the Railway Committee the authority required by the 74th section of the Railway Act. The company's liability must of course be limited to the damage caused by the raising of the grade above the height to which, as marked upon the hydrants on Britannia Terrace, mentioned in the eleventh clause of the agreement, the defendants were authorized to raise it, as that was the grade to which in building the houses the plaintiffs admit they should have conformed, being the grade to which they were told by the corporation they intended to raise the street opposite the land. So far as the plaintiffs failed to conform to that grade they must be deemed to have brought the loss upon themselves and cannot recover for it.

Judgment,
OBLER,
J.A.

The appeal must be allowed.

BASKERVILLE V. CITY OF OTTAWA ET AL.

In this case the Canada Atlantic Railway Company were made parties defendants by the order of a local Judge on the application of the city corporation. The plaintiffs refused to amend their statement of claim, or to assert any demand or right of action whatever against the defendants so added, either in the pleadings or at the trial, and therefore the only possible standing they had in the action was for the purpose of enabling the city corporation to obtain relief or indemnity over against them if they themselves should be found to be liable to the plaintiffs for any damage which by the terms of their agreement or by statute they were entitled to require the railway company to save them harmless from.

But inasmuch as the plaintiffs would seek no relief against the railway in this action, I think, with all respect for the learned trial Judge, that it was not competent to give judgment directly against them.

Judgment.

**OSLER,
J.A.**

The only questions were, whether the city was liable as a wrongdoer, and if so, whether the damages awarded against them should be recouped by the railway company. I think that the plaintiffs can recover only against the actual wrongdoers, the railway company, and not against the city, who are merely leaving the street, perfectly good as a street, in the condition in which the railway company, without any authority from the city, left it, and did thereby the damage to the plaintiffs' property of which they complain. The result is that the appeal must be allowed, and the action dismissed.

The plaintiffs must, of course, pay the city's costs, other than those occasioned by the proceedings against the railway company, and *semble*, the city should have no costs against the railway company, as they brought them into the case, as it turns out, unnecessarily.

MACLENNAN, J. A. :—

It is proved in the clearest manner, and is so found by the learned Judge, that in front of the plaintiffs' land, which is the only part of the street the condition of which can give the plaintiffs any right of action, the grade has been raised very considerably above the level to which the plaintiffs, with the approval of the city, conformed in erecting their buildings, and in argument before us it was not contested that thereby the plaintiffs suffered damage; and the only question is whether the defendants or either of them are liable to the plaintiffs for that damage, in these actions or either of them, and whether, if the city is liable, they are entitled to the judgment of indemnity which has been awarded. I am of opinion that the judgment is right in holding that both defendants are liable. I think the railway company is liable for placing the embankment on the street, and that the city corporation is liable for allowing the obstruction to remain, and for not taking steps to remove it after notice and the lapse of a reasonable time for doing so.

First, as to the liability of the railway company. I agree with my brother MacMahon that it is a very serious question whether the railway company had any legal right at all to lay their track across the street on its present line, that being a deviation from the line adopted by the original survey and defined in their original map or plan and book of reference. But I do not think it necessary to determine that question. It is sufficient to point out that by section 10 of the Railway Act of 1868, 31 Vic. ch. 68; section 15 of the Act of 1879, 42 Vic. ch. 9, and section 12 of R. S. C. ch. 109, which are substantially identical, and which were applicable to this company when the acts complained of were done, they were forbidden to place any part of their railway which crosses a highway, otherwise than by a bridge or tunnel, more than one inch above the level of the highway. The city had fixed the level of this street by certain marks, and the railway company were bound to conform to it. There was a grade marked on the hydrants in the street, the same grade as was given to the plaintiffs, and that grade is expressly mentioned in the agreement between the company and the city, as the level to which in certain events the company were to fill up and macadamize the street. I think that was notice to the railway company of the true level to which the street was to be raised, when put in a proper state of repair, and they could not go beyond it. But whether they had notice or not they were bound to find out and know the level. If they had put their track down upon the old level, they might have been excused, but when they undertook themselves to raise the level, they were bound to ascertain the level fixed by the city, and to conform to it. I am therefore clearly of opinion, that the company's embankment and track, so far as they exceed one inch above the grade marked upon the hydrant, are an illegal obstruction, and that for the injury suffered therefrom they are liable to the plaintiffs.

Judgment.

 MACLENNAN,
J.A.

As to the city's liability, it was contended that as the agreement did not authorize any excess beyond the estab-

Judgment, lished grade, and as the work was done by the railway company the city could not be liable. I agree that by taking a covenant from the company not to raise the level more than six feet, the city did not authorize a raising even to that height, unless the company had power to do it; but the agreement did, so far as the city could do it, authorize the railway company to cross this street, and I think the city was bound to see that in making the crossing the company did not exceed its powers, and to correct any such excess. I think the excessive embankment was a nuisance which the city was bound within a reasonable time to remove, and that not having done so they are responsible to the plaintiffs. The city did not profess or intend to raise the level of the street above the hydrant grade in the public interest, or as a corporate act of repair or improvement. If they had and if it could be shewn that the city had approved of and had adopted the increased grade the plaintiffs' remedy might have been restricted to compensation, by agreement, or the award of arbitrators, but under the actual circumstances I think the non-removal of the injurious obstruction is negligence for which the plaintiffs are entitled to maintain this action.

The plaintiffs would have been satisfied with the disposition made by the learned Judge of both actions, but both the city and the railway company having appealed against the judgment in the action in which they were both defendants, the plaintiffs have by way of precaution appealed against the judgment dismissing their action against the railway company alone; and it is necessary to consider whether, although the judgment is substantially right, it is also right in point of form. The plaintiffs' cause of action against the company and that against the city are not quite the same. They sue the company for placing the embankment on the street, but their action against the city is for leaving it there and not removing it within a reasonable time after notice. They had a right to sue them separately, although they might certainly have sued them both in one action, under Con. Rule 301, formerly

Rule 91 of the Judicature Act: Holmsted & Langton, p. 319, and cases there collected. In the present case the city had notice of the obstruction from the first, and therefore would be liable to the same damages as the railway company, and there would have been less objection to both being sued in the same action. I cannot say, however, that the plaintiffs can be blamed for bringing separate actions. Then when the action against the city was brought, it was within the right of the city, under section 531 (4) of the Municipal Act, to bring the company in, in order to have their remedy over. In the absence of a remedy over on the agreement between them, they had to bring the company in as defendants, for by the section just mentioned the remedy is made conditional upon their doing so. I think, therefore, the city was quite right in bringing the company into the second action, notwithstanding the pendency of the other, and that the pendency of the other action could be no defence to the city's claim. Section 531 (4) seems intended solely for the purpose of the remedy over, which it gives, and not for the purpose of giving a judgment to the plaintiffs against the added party. This is the view of the case which seems to have been taken by the parties. The plaintiffs state no case and ask no relief against the railway company, and the case made and the relief asked against them is by the city. I think the plaintiffs might well say they were only concerned in establishing their claim against the city in that action, and that it did not matter to them whether the city could or could not succeed in their claim of indemnity against the railway company. That was a matter entirely between the defendants and concerned them alone. It was right to do as the parties did, to try both actions together, but it would have been unjust to the plaintiffs to leave them to rely for relief against the railway company in the action against the city, because while the first action was brought within six months of the injury, and therefore was not, and could not be, met by the Statute of Limitations, the

Judgment.
MACLENNAN,
J.A.

Judgment. other action was not brought until two years later, and the
MACLENNAN, company had pleaded the statute as a bar. The learned
J.A. Judge has held that the Limitation Act does not apply, and he is probably right, but the plaintiffs ought not to have been exposed to the chance of its being held otherwise.

I think therefore the learned Judge ought not to have dismissed the action in which the railway company alone was a defendant, but should have given judgment in that case in favour of the plaintiffs.

Then what should the judgment in the other action have been? I think it is quite right in holding the city liable, but I think there should have been no judgment for the plaintiffs against the railway company. The plaintiffs' recovery against the railway company should have been left to depend on the action against them alone. But I think also that the judgment of indemnity against the railway company in favour of the city is quite proper. I do not think the agreement between them and the city authorized the railway company to raise the embankment beyond the hydrant grade, and I incline to think that they are liable on their covenant with the city contained in the fifteenth clause of the agreement between them to indemnify the city for having done so. But if not liable on the covenant they are made liable by the express terms of section 531 (4) of the Municipal Act, which gives a remedy over in all such cases. I do not think the circumstance that the party placing the obstruction has actually contracted to indemnify the municipality against damages arising from it, excludes the applicability of the section, or obliges the latter to resort to a separate action.

I therefore think the plaintiffs' appeal should be allowed in the action against the railway company, and that the judgment in the other action should be varied by restricting it and making it a judgment for the plaintiffs against the city alone, with a remedy over by the city against the railway company. The two actions should then be con-

solidated with a single reference as to the plaintiffs' damages, which must be confined to those caused by the excess of the embankment beyond the level or grade marked upon the hydrants.

Judgment.
 MACLENNAN,
 J.A.

*Appeal in the first action allowed with costs, and
 appeal in the second action allowed with costs,
 MACLENNAN, J. A., dissenting.*

IN RE THE CITY OF TORONTO AND THE TORONTO STREET
 RAILWAY COMPANY.

Toronto Street Railway Company—Franchise—Property—Roadbed.

Under the statutes and agreements affecting the Toronto Street Railway Company, the possibility of exercising the franchise beyond the period of thirty years therein mentioned if the city should not take over the railway, is not "property" the value of which could be taken into consideration by the arbitrators in arriving at the amount payable by the city on assuming the ownership of the railway.

Nor was the company entitled to any allowance for permanent pavements constructed by the city under an agreement by which the company in lieu of constructing and maintaining such pavements, as provided by former agreements, paid the city an annual allowance for the use thereof.

The company's rights in respect of the extensions of the railway made from time to time come to an end at the expiration of the thirty years mentioned in the original agreement.

Judgment of ROBERTSON, J., 22 O. R. 374, affirmed, BURTON, J. A., dissenting on the second point.

THIS was an appeal from the judgment of ROBERTSON, J., reported 22 O. R. 374, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J. A., on the 23rd, 24th, 25th, and 28th of November, 1892. The questions in issue arose under certain statutes and agreements which are set out in the judgments in the Court below and in this Court, and the arguments addressed to this Court were the same as those fully reported in the Court below.

McCarthy, Q. C., Moss, Q. C., and Shepley, Q. C., for the appellants.

Robinson, Q. C., S. H. Blake, Q. C., and Carroll, for the respondents.

Judgment. January 17th, 1893. HAGARTY, C. J. O. :—

HAGARTY,
C.J.O.

On the first question, as to the refusal of the arbitrators to value the alleged franchise of the defendant company, I am of opinion that the judgment appealed against is right.

I have given my fullest consideration to the very elaborate and most able argument of Mr. McCarthy on this point, and I still am unable to understand the process of reasoning leading to the conclusion that the award should be referred back for any such valuation.

There was no attempt made, nor could it be made to prove that any of the alleged franchises could be in any way whatever exercised or used by the company in Toronto.

Under the original contract and statute, and the statutes subsequently passed on the subject, it was shewn beyond serious objection, that the city had duly exercised its clear right at the end of the thirty years to enter upon and take possession of the whole system of street railways; thus putting to a conclusive end all right and power of the company to work or interfere with the railway, leaving only the question of payment of the value to be settled by arbitration.

I cannot, and do not deem it necessary to attempt to follow the long excursions into the domain of real property law as to the nature of franchises, their duration, their extinction, and the multifarious points possible to arise. It is not necessary to object to any of the legal principles laid down in the American cases relied on by the appellants. An examination of their facts will at once shew their inapplicability to the case before us.

No complication has arisen here involving any third interests or rights. The whole controversy rests between these two litigants.

It was not, as I understood the argument, attempted to be shewn that any substantial value could be attached to these franchises, or to suggest how, or on what basis, such value could be arrived at, assuming that they still existed.

If on the merest legal technicality the arbitrators were bound to value them it would be idle to send the award back merely to have a shilling formally awarded. The referees say: "We have not allowed anything for the value of any privilege or franchise extending beyond said period of thirty years, as we consider no privilege or franchise exists beyond that period."

Judgment.

HAGARTY,
C.J.O.

It is most difficult to understand, as the referees evidently considered, that any such privilege or franchise could be a subject for valuation if it were utterly incapable of being used or enjoyed. All right to use the streets was gone for ever. No witness could say that such an alleged franchise could be a subject of sale or value as a marketable asset or security. Unless we could be convinced that the referees were legally wrong, and improperly refused to value what is shewn to us or suggested to be of any appreciable value, we ought not to interfere. My strong opinion is that the referees have not taken any course detrimental to the rights of the appellants.

In *Regina v. Lancaster, etc. R. W. Co.*, 6 Q. B. 759, a compensation jury had been called under a warrant to assess and give a verdict for the money, if any, to be paid for the damages, if any, which should have been done.

The jury found (as set forth in the return of the inquisition) that the said J. C. had not sustained any damages by reason, etc.

The Court said it would have been better to have omitted the words "if any." Sir John Coleridge said: "The words 'if any,' though it would be better if they were away, do not affect the validity of the warrant: for, though the enquiry may go only to the *quantum*, that *quantum* may be nothing. Then the jury cannot be expected to give a farthing: strictly speaking, such a finding, if there were no damages, would be a violation of their oath as much as the finding of a large sum."

This language seems well fitted to this case.

We must remember that the referees' functions here were to value the property, and not under any Acts relating to compensation by railways, etc.

Judgment.

HAGARTY,
C.J.O.

There may be a legal error in the words of the award, describing the nature of the grant or franchise, limiting it wholly to the thirty years. The learned Judge corrects this statement in his judgment, and gives a more technically correct definition.

I agree with him in thinking that this cannot affect the validity of this judgment.

I also agree that all extensions made from time to time in the street railway fall under the one general contract, and cannot be treated separately as creating separate rights.

As to the remaining question:—The arbitrators refused to make any allowances for permanent pavements constructed by the city subsequent to 31st December, 1888, holding that such could not be considered as having been constructed or paid for by the company so as to entitle it to any allowance therefor under section 5 of 40 Vic. ch. 85.

This section directed that the arbitrators should estimate as an asset of the company the value to them of any permanent pavements constructed or paid for by the company for the balance of the life of said pavements.

Many disputes arose between the parties as to the pavements and work which the company had to do. At last it was agreed that the city should do the work, assessing the company therefor from year to year, the annual assessment being about \$8,800.

The agreement of January 19th, 1889, was intended to settle these difficulties, and a new arrangement was made, commencing at the beginning of the year 1889.

"2. From December 31st, 1888, the company is to pay the city in lieu of all claims on account of debentures maturing after that date, and in lieu of the company's liability for construction, renewal, maintenance, and repair in respect of all the portions of streets occupied by the company's tracks at the rate of \$600 per mile of single track (\$1,200 per mile of double track) per annum, so long as the franchise of the company to use the said streets, or any of them, now extends; such sum to be paid quarterly.

4. The said payments shall be accepted by the city in full satisfaction and discharge of all claims upon the company in respect of the construction, renewal, maintenance, and repair of all the aforesaid portions of the said streets, and also in respect of all claims by the city upon the company for damages and costs suffered or paid by the city by reason of the nonconstruction or nonrepair thereof by the company ; and hereafter the city shall undertake the construction, renewal, maintenance, and repair of all the aforesaid portions of the said streets, but not of the company's tracks, ties, and stringers.

5. As between the company and the city, the city shall have the sole right in every case from time to time to determine the kind of roadbed or roadbeds, pavement, or pavements (if any) to be laid down, constructed, or maintained upon the said streets, or upon the portions thereof occupied and used by the company, and the manner in which the same shall be constructed ; and the liability of the city to the company in respect of the construction, renewal, repair, and maintenance of roads, shall be as defined by section 531 of the Municipal Act, save that the city shall be bound to indemnify the company against any damages or costs which the company may have to pay to third parties by reason exclusively of neglect on the part of the city to repair or to keep in repair the portions of the streets aforesaid."

Section 11 provided that the agreement was not to affect the rights of either party in respect of the matters referred to in the 18th resolution in by-law 353 of the city, etc., nor in respect of any matter not herein specifically dealt with.

The learned Judge below thus deals with it :

"To my mind there can be nothing clearer, than what that agreement means. It is simply this: Instead of having one part of the roadbed of the streets made by the city, and that part of it between the rails and for eighteen inches outside of each rail made by the company, and to avoid the difficulties which past experience had taught

Judgment.

HAGARTY,
C.J.O.

Judgment.

HAGARTY,
C.J.O.

both parties in working in that way, they agreed that the city should do the whole, the company laying down its ties, sleepers and rails, and that for the use of that part which the company under the original agreement and the several statutes was bound to construct and keep in repair, they should pay the city an annual amount per mile for the use thereof. Surely that could give the company no property in the roadbed which they did not construct—it was a mere license to use it for and during the continuation of the time which the company had the right to use the streets under the agreement of 1861. But to claim that such an arrangement entitled the company to have this roadbed treated as part of its railway property to be valued and paid for by the city which had, at its own expense, constructed it, is something beyond my comprehension. If the agreement had been that the city should charge the company with the cost of construction, instead of for the use of it after it had been constructed, I could understand that it had a proper claim to get back the value of the life that remained in these roadbeds from the time the city assumed the ownership of the railway property; but the company did not expend anything whatever in their construction, and therefore it had no 'property' in them after the expiration of its term."

I share the difficulty expressed by my learned brother Robertson as to this claim of the appellants. They claim that these pavements made after and under the agreement were, if not constructed by them, paid for by them.

That must be on the ground of their payment of the \$600 per mile. That payment is stated to be in lieu of their liability for construction, maintenance, repair, etc.

The city undertake subsequent constructions, renewals, etc.

The city to have the sole right to determine the kind of roadbed, pavement, etc., and the manner of construction, and they will bear all the consequences of neglect, etc.

Now, so long as the roadway was kept in a useable way fit for travel by the company, the city was not bound to lay down any pavement whatever.

I do not see how the company could resist or refuse payment of the mileage rate on any ground, so long as they could reasonably use their railways. The city could content itself with the cheapest and simplest repairs, accepting this mileage rate as a discharge for the company's undoubted liability as to construction and repairs. But how can it be urged that whatever pavement the city chose to put down should be considered as the creation of an asset of the company as if done by them? This must rest on the assumption that the mileage rate was accepted by the city as payment for all work however costly which the city might elect to do.

I can hardly conceive it possible, that the city having full power to adopt the cheapest way of performing this part of the bargain, would expend very large sums of money to create an asset as costly as possible for the benefit of the company; and I must respectfully express my disbelief in the proposition that either contracting party understood it in the light in which the appellants now ask us to view it.

I repeat that in my judgment the full consideration for the mileage payment was the relief of the company from all these liabilities as to construction and maintenance; the city from thenceforth accepting the whole burden thereof, and being only bound to keep the roadway in such a state as to leave the company the full use and benefit of the due user of the railway.

MACLENNAN, J. A. :—

The main question in this appeal is a claim by the company to have their privilege of operating railways on the streets of the city valued and paid for as a privilege of perpetual duration. The arbitrators were of opinion that the privilege was not perpetual, and they allowed nothing in their award for the value of any privilege or franchise extending beyond thirty years from the date of the original concession to Easton. The question is very important, the

Judgment.

HAGARTY,
C.J.O.

Judgment.
MACLENNAN,
J. A.

company's claim in respect thereof being, as I understand, three or four millions of dollars, but I do not think it is one of very great difficulty.

It will assist in making the question clear to look with attention at the instruments which constitute the company's title. The first instrument is the agreement with Easton made by the city by deed of the 26th March, 1861. By that deed the city granted to Easton the exclusive right of constructing, maintaining, and operating railways on King street, Queen street, and Yonge street for the term of thirty years, upon the conditions and subject to the regulations, conditions and stipulations expressed in certain resolutions of the city council which are therein recited. The eighteenth of these resolutions declares that the privilege granted by the agreement shall extend over a period of thirty years from its date; but at the expiration thereof the corporation may, after giving six months' notice prior to the expiration of the said term of their intention, assume the ownership of the railway and all real and personal property in connection with the working thereof on payment of their value to be determined by arbitration; and in case the corporation should fail in exercising the right of assuming the ownership of the said railway at the expiration of thirty years as aforesaid, the corporation may at the expiration of every five years to elapse after the first thirty years exercise the same right of assuming the ownership of the said railway and of all real and personal estate thereunto appertaining, after one year's notice to be given within the twelve months immediately preceding the expiration of every fifth year as aforesaid, and on payment of their value, to be determined by arbitration. Besides the resolutions set forth in the recital, the deed contains covenants by the city, one of which is for quiet enjoyment, and another that as soon as the necessary power to sanction the agreement should be obtained from the Legislature, and as soon as the city should be legally authorized so to do, it would pass a by-law framed in accordance with the resolutions. The deed also contains covenants by

Easton, the first of which was that he would construct, maintain and operate the said railways within the times in the manner and upon the conditions in the resolutions and in the deed set forth.

Judgment.

MACLENNAN,
J.A.

On the 18th of May following, an Act was passed incorporating Easton and others by the name of The Toronto Street Railway Company; and the company was empowered to construct, maintain and operate railways upon and along any of the streets or highways in Toronto. By section 5 they were authorised to do so, provided the consent of the city should be first obtained, and the city was thereby authorised to grant permission to do so upon such considerations and for such period or periods as might be agreed upon between the city and the company. The Act also authorised the city and the company to make any agreements which might be necessary respecting the various matters which might require adjustment between them in connection with the construction and working of the railway; and among other things as to the particular streets along which the railway was to be placed. The last clause of the Act recited briefly the agreement above mentioned between the city and Easton, and enacted that it should be held to be a valid and binding agreement, "and that the corporation of Toronto had full power and authority to enter into and make such agreement upon the conditions and for the purposes therein mentioned, and the said corporation are hereby authorized to pass any by-law or by-laws for the purpose of carrying into effect the said recited agreement."

On the 22nd of July afterwards, the city passed a by-law, No. 353, whereby after reciting *in extenso* the agreement with Easton of 26th of March, and that by the Act just referred to it was declared that the agreement was valid, and that the corporation had full power and authority to make it, the corporation ratified and confirmed it.

I pause here to consider the effect of all that up to this time had taken place.

As a matter of fact when the city made its agreement.

Judgment. with Easton it may be conceded that it had not the power to make it, or to give him the right to occupy and use the streets for railway purposes ; but the effect of the Act of the Legislature is such, that we must hold as a matter of law that the city really had the power, for the Act says expressly that it had full power and authority to do so. Therefore the effect of the agreement and of the 16th section of the Act and of the by-law together was, that the city had granted to Easton, and Easton had acquired, the right to lay down rails on certain streets, and to use them with certain exclusive privileges for operating a railway for his own profit. The legal nature of the privilege thus granted was considered in *Toronto Street Railway Company v. Fleming*, 35 U. C. R. 264, and 37 U. C. R. 116 ; and although it was held in this Court not be an assessable interest, yet it was agreed by all the learned Judges in both Courts to be an interest in land. Easton therefore had acquired an interest in the streets for a term of thirty years as expressed in the eighteenth resolution recited in the agreement. Then what was the position of the company which had been incorporated ? The Legislature had given it corporate life, existence and capacity ; had given it certain powers and faculties, but it did not confer upon it any property, or any right to enter upon the streets of the city. It could only acquire property in the same way as other persons, and it could not exercise rights over the streets without acquiring them. All that the Legislature had given was corporate capacity to construct railways on the streets and to carry on a railway business thereon ; provided they got the right from the city. At the point of time which we are now considering the company had corporate capacity merely, they had no right to make any use of the streets. The only person who could do that was Easton.

It was argued before us in order to give an apparently perpetual character to the company's right to use the streets that the right to do so had been acquired from the Legislature, and that its duration was therefore the same as that of the company's corporate powers. No doubt the theory

of a corporation, unless expressly limited in its duration, is that it lasts for ever, and it follows that its corporate powers, otherwise called its corporate franchises, are also perpetual, and if the power to occupy the streets had been expressly given to the company by the statute without any qualification or limitation the interest would be perpetual or in the nature of a fee simple. But as I have shewn the company did not get this right from the Legislature at all. The city had given it to Easton, and for some time after the company was incorporated it did not possess it at all. As we have seen the company was incorporated on the 18th May, 1861, and from that time until the 11th January, 1862, the right in question belonged to Easton and not to the company. On the last mentioned day, Easton, by deed reciting the agreement between him and the city, and the by-law No. 353, assigned to the company the agreement and all the rights, privileges, powers, franchises and authority therein contained, and all his interest therein, for and during the full end and term of thirty years therein mentioned and expressed. And the assignment contained a proviso and a covenant that the company would observe all the stipulations of the agreement and the by-laws of the city during the continuance of the said term of thirty years, and would indemnify Easton in respect thereof. The assignment also contained a power of attorney from Easton to the company, to enable them to do all the things which he was by the agreement authorised and empowered to do.

Judgment.

MACLENNAN,
J.A.

Putting aside for the present a question which has been raised as to some of the streets, occupied for the first time at a recent period, it is clear that the company got its right to occupy the streets for their railway business from Easton by means of the assignment just mentioned, and by that means alone, and that Easton obtained it from the city, which, in the language of the Act, "had full power and authority to give it."

The present company is not the original Toronto Street Railway Company, but another company of the same

Judgment.
MACLENNAN,
J.A.

name; but they derive their rights and their title, so far as the present question is concerned, through several intermediate links from the old company. I have examined the mortgage to Mr. Cayley, the Act enabling the mortgagee to sell, and the conveyance made to Mr. Kiely under the mortgage sale, and I am of opinion that by none of these instruments have the rights, powers and claims of the new company been in any way enlarged or extended, so far as the present question is concerned, beyond those derived from Easton.

The question therefore is whether the company is entitled under resolution eighteen of the Easton agreement to be paid anything for the value of the right to occupy the streets for the purposes of the railway, as of a right extending beyond the term of thirty years. It is quite immaterial what name is given to the right, whether it is called a franchise or an easement, or anything else. It is a right to use and occupy land in a certain way for profit, and to change the soil and substance of it, and to affix rails, ties and sleepers thereto, so as to adapt it to the grantees' use, and that not merely temporarily or revocably but for a durable permanent purpose. It is a valuable interest in land, and I am unable to see that it is a different interest whether it is granted as here by the city over a public street, or granted by a private owner over a private way or over his field or garden, or other freehold. I think that the city having had, as the Legislature has declared they had, the power to grant this concession to Easton, the circumstance that the streets are public highways is wholly immaterial for the purpose of the present question, and that it must be decided just as if the streets were the city's ordinary freehold out of which it had made this grant.

We have seen that what is here in question is an interest in land. It was granted to Easton, a natural person, and not to the company. There are no words of inheritance in the grant, it is to Easton, his executors, administrators and assigns. The only way by which a

perpetuity in land can be granted to a natural person, is to grant it in fee; and when the grant in question was made, the law required for that purpose the use of words of inheritance, which was not done. But not only is it not a grant in fee, but it is in express terms a grant for years. It is for "the said term of thirty years," and when Easton assigns it to the company, it is "for and during the full term of thirty years therein mentioned and expressed." If it depended on the words of the grant there would be no room for argument, and the claim of the company has to rest upon that part of the eighteenth resolution which enables the corporation, by giving notice, to acquire the ownership of the railway, and all the real and personal property in connection with the working thereof on payment of their value, in the first place at the end of the thirty years, and if not done then, at the end of any subsequent five years. The argument of the appellants' counsel is that there is here by implication an extension of the term beyond the thirty years, and that by possibility it might go on for ever; that as the corporation was perpetual, and the city might never choose to give notice or to pay the value the right might never end. I cannot accede to this argument at all. Even if it is granted that there is an implied extension of the time for successive periods of five years, the grant or concession is still as plainly as possible nothing more or less than a lease for years. It is for thirty years certain, and then upon a certain contingency an extension for a further term of five years, and so on. But the contingency never happened, and therefore the further term never arose. The lessor had from the beginning the power to prevent any extension of the term, and did so. It was in effect always optional with the lessor whether the term should be extended. How then is it possible for the company to claim payment for what they never had, and the getting of which depended on the will of the lessor?

If this had been a devise for fifty years or a hundred years, with a power to the lessor to put an end to it at the end of thirty years on payment of the value of the

Judgment.

MACLENNAN,
J.A.

Judgment. unexpired term, and of the other property of the lessee,
MACLENNAN, there would be an interest in the land to be valued and
J. A. paid for; but here the company is asking payment for what never belonged to them. I think this is a case of a demise for thirty years with at most the privilege of renewal for further successive terms of five years at the option of the lessor, for it is equally an option whether it is to be exercised by doing, or by omitting to do something. The analogy of a tenancy from year to year to this case is in my judgment perfect, except that in the case of a yearly tenancy either party can put an end to it. But unless one or other do it may go on for ever. Here the power rested with the city, and they have exercised it. No one would contend that a yearly tenancy is equal to a fee, because it may go on for an indefinite period. Other similar cases may be imagined; a fee simple, granted by will, subject to an executory devise over; or a common law conveyance with shifting uses. In such cases, a devisee or grantee may have a fee simple which may never be defeated, but being liable to be defeated, its value to the owner is thereby affected to such an extent that it may be worth very little indeed.

In my judgment this term, taking the most favourable view of the company's rights, was from the beginning liable to be determined at the end of the thirty years, and it did so determine; the city having decided to assume the ownership of the railway and the working plant. It might have been extended under certain circumstances, but those circumstances never occurred and the time was never extended. It is not necessary to decide the point, but I think the term ended with the thirty years, whether the city chose to buy the property or not. The company could not have been compelled to go on. They could abandon their rails and remove their plant elsewhere, or dispose of their cars and horses in any way they pleased, and I think it is impossible to hold that the clause of forfeiture for not working the railway extended beyond the thirty years. Neither could the city be compelled to buy. The

deed does not say they shall buy, but that upon giving a certain notice they may acquire the property. I think, too, it would be a very serious question whether the company could under any circumstances claim an extension of the term, and whether, if the city declined to take the property at the end of the thirty years, the company could maintain their possession of the streets for a further period. Fortunately we have not to decide that question, for the city did exercise their privilege of taking the property and paying for it, and therefore no question of a further term can or could arise.

Judgment.

MACLENNAN,
J. A.

It was also argued that the word "railway" being used as describing one of the things to be valued, included the interest in the land which was necessary for its use. In speaking of the railway of a company, the word may undoubtedly mean the undertaking, and may include all the company's property and plant. But the word is clearly not used in that sense here, for it goes on to say, "and all the real and personal property in connection with the working thereof." I think the word is used here just as it is used in other parts of the deed, as meaning the physical structure upon the ground, the rails, ties, etc. That is the meaning of the word in the preamble and in the first resolution. The inhabitants of the city are said in the preamble to have petitioned the council to sanction the construction of street railways in, along, and upon the streets of the city; and in the first resolution it is declared that Easton be authorized to lay down street railways of approved construction on any of the streets.

The case is like as if a landowner should demise land to a tenant for a term of years, with the privilege of building and erecting a mill thereon; the landlord to have the privilege of assuming the ownership of the mill at the end of the term on paying its value. In that case, the thing to be valued would be the mere structure of the mill, and not also the land on which it stood as well.

I am therefore of opinion, that the main ground of appeal fails, and that the arbitrators were right in not allowing

Judgment. the company anything for any right of occupying the streets for railway purposes after the expiration of the term of thirty years.
MAULENNAN, J.A.

It was however contended, that even if the company could not claim a duration for their privileges under the Easton agreement beyond the term of thirty years, the agreement was applicable only to the three streets therein expressly named, and that as to all the other streets subsequently occupied, the term was either unlimited or extended for thirty years from the dates at which the railway was extended to them respectively.

As to some of these streets, there were special agreements; one dated the 29th July, 1881, and the other the 29th July, 1884. As to these streets, I think it too clear to admit of argument, that the agreements place them to all intents and purposes on the same footing as the three streets specified in the original agreement, and that the company's rights in respect of them came to an end at the same time.

There have been however, some streets occupied by the company without any special contract, and at the mere request of the city engineer, or in pursuance of resolutions of the city council, but without any by-law, and as to these streets at all events, it is contended that the company's right of occupation is unlimited and perpetual. I am, however, of opinion that this contention also fails. By the original Act of incorporation of the company, it obtained power to occupy with their railway any of the streets, provided they first obtained the consent of the city; and the city was authorized to grant such consent for such period or periods as might be agreed upon. The company did not apply to the city directly for, and never obtained any such consent, but contented themselves with an assignment of the agreement made between the city and Easton, and with the consent which had been granted to him. In that agreement it is declared that the city had accepted Easton's proposals by certain resolutions, the first of which was that Easton was authorized to lay down street railways of ap-

proved construction on any of the streets of the city, the same to be worked under such regulations as may be necessary for the protection of the citizens. The last of the resolutions, the twenty-fourth, declared that in the event of any other parties proposing to construct railways on any of the streets not occupied by him to whom the privilege is now to be granted, the nature of the proposals thus made shall be communicated to him, and the option of constructing such proposed railway on similar conditions as are herein stipulated shall be offered ; but if such preference is not accepted within one month, the corporation may grant the privilege to other parties.

Judgment.

MACLENNAN,
J.A.

Now I think the meaning of these two resolutions when read together is very plain. It is this: Easton is to have the right to build on any of the streets subject to proper regulations. He is not obliged at present to build on any but the three which are expressly named in the operative part of the deed, but if any one else at any time proposes to build on any unoccupied street, he is not to be deprived of his right without the opportunity of exercising it, but he must either exercise it without delay or lose it. The words "the party to whom the privilege is now to be granted" evidently refer to the privilege granted in the first resolution to Easton of building on any street whatever, and resolution twenty-four is intended for the protection of the city. The first resolution gave the right over all the streets, the eighteenth resolution gave that right for thirty years, and now the twenty-fourth enables the city to put pressure upon Easton to build on any street as required by public convenience, or if he did not, then the city could deprive him of his right and give it to some one else. It was conceded on the argument that the twenty-fourth resolution was binding on both parties ; and if I am right in its construction, then it follows that from the beginning the company had, under the agreement which was assigned to them by Easton, a right which extended over all the streets of the city, and that right was limited

Judgment. to a term of thirty years. I think that is the effect of the
MACLENNAN, resolutions, and looking at the manner in which they are
J.A. referred to in the more operative parts of the deed and in the covenants, I think they are all intended to be material parts of the agreement. This view of the resolutions is also, in my judgment, strengthened enormously by the last covenant by the city, without delay to pass a by-law framed in accordance with the resolutions. There are expressions in the judgment of Mr. Justice Patterson in the case in this Court between the city and the company, 15 A. R. 30, at p. 43, which may seem at variance with this view of the Easton contract; but I do not think they are when carefully considered, and all that was decided was that for the purposes of the question then before the Court only three streets named in the agreement were within it.

I am, therefore, of opinion that all the extensions of the company's tracks to other streets made from time to time, besides the three expressly named in the agreement, must be taken to have been in pursuance of, and with reference to, the right expressed in and given by the first resolution therein recited, and to be qualified as to the duration of the privilege by resolution eighteen. The right to occupy all the streets was given and existed from the beginning, but was not availed of, either by the city requiring it, or by the company doing it, until the public needs, and the interest of the company called for it. And the acts of the parties and the documents, and the legislation from the beginning to the present time, are all inconsistent with the notion that the company's rights and privileges were in any way different as to some of the streets from what they were as to others.

I therefore think the appeal fails on this point also.

The remaining question is, as to the right of the company to be paid a sum of \$167,000 for pavements constructed by the city in connection with twelve miles of new railway track laid down by the company during the last two and a quarter years of the term, that is to say, after the 31st day of December, 1888.

By the Easton agreement, resolution three, the company was bound to pave or macadamize and keep in repair the roadway between and for one foot six inches from and outside of each rail; and there was no provision for their being allowed for that pavement in the event of the city electing to assume the railway and the property connected therewith at the end of the term. This was changed by two Acts passed in 1876 and 1877, the effect of which was briefly as follows: the company became bound to pave, maintain, and repair the part of the street between and for one and a-half feet outside the rails, with the same kind of pavement used by the city for the remainder of the street; but if the city paves with wood, stone, asphalt, or other material of the like permanent character, the company could require the city to do the work, the company paying the actual cost thereof, not exceeding \$2.50 per yard. If the company neglected to keep the pavement in repair, the city could do so and charge the company with the cost. If the city should change any pavement (other than macadam, cobble, or boulder stone) constructed or paid for by the company before it was worn out, the city was bound to make good to the company the then value of the old paving. In all cases of construction or renewal of permanent pavement, the company had the option of doing the work or requiring the city to do it, the company paying for it at cost, not exceeding \$2.50 per yard, in annual instalments on the local improvement plan; and finally it was provided that if the city assumed the railway and its plant at the end of the term, the arbitrators were to estimate as an asset in favour of the company any permanent pavement constructed or paid for by them after that date for the life of the pavement.

Judgment.

MACLENNAN,
J.A.

These were the enactments which governed the parties on the subject of pavements from 1877 to 31st December, 1888. During that time and until the year 1886 large quantities of new pavement had been laid, and repairs had been made by the city and charged to the company, and large payments had also been made to the city by the company on

Judgment. account of repairs and also on account of instalments due
MACLENNAN, on the local improvement plan for construction of pave-
J.A. ments. Disputes then arose between the parties about the pavements and repairs, the company contending that they were not of such character and quality as they were bound to pay for, and an action was brought by the city to recover the sums which they claimed to be due. In this action a judgment was pronounced by Mr. Justice Rose to some extent adverse to the city, and thereupon they settled that and other actions between them, and all disputes therein involved, by an agreement dated the 19th January, 1889, which has given rise to the question now under consideration.

After the agreement, and before the end of the term of thirty years on the 26th March, 1891, the company laid twelve miles of new track, and the city laid down permanent pavements in connection therewith at an expense of \$167,000. The company claimed to be allowed this sum by the arbitrators under the enactment of the year 1877 above set out. The city resisted this, contending that the agreement of the 19th of January had changed the whole agreement between the parties as to the construction of pavements, and that while the company were entitled to be allowed the value of the life of pavements constructed or paid for by them between 1877 and 1889, so far as they were not worn out, they had no claim for those constructed after that period, for the reason that they had neither constructed nor paid for them.

It is evident that this is a pure question of the construction of the agreement. The arbitrators disallowed the claim, and the learned Judge has upheld their award in that respect.

The agreement, after stating that the several actions which were pending between the parties on the 31st of December, 1888, and all claims by either party against the other therein involved were to be regarded as settled thereby, declared that the company was to pay the city the debenture accounts for the years 1887 and 1888, meaning

thereby the instalments for those years on the local improvement plan. Then by section 2, it was agreed that from 31st December, 1888, the company was to pay the city in lieu of all claims on account of debentures maturing after that date, and in lieu of the company's liability for construction, renewal, maintenance and repair in respect of all the portions of the streets occupied by the company's tracks, at the rate of \$600 per annum per mile of single track, until the end of the term. The next clause makes it plain that what was meant was that the company were to pay the sum named, not merely for the number of miles then constructed, but also for extensions to be made during the remainder of the term; for it provides that for the purposes of payment the mileage shall be certified quarterly by two engineers. The fourth section declares that the payments per mile shall be accepted by the city in full satisfaction and discharge of all claims on the company in respect of the construction, renewal, maintenance and repair of all the aforesaid portions of the street, and also in respect of all claims for damages and costs suffered or paid by the city by reason of the non-construction or non-repair thereof by the company; and that thereafter the city is to undertake the construction, renewal, maintenance and repair of the portions of the streets in question. Then follow six paragraphs regulating various matters as between themselves with reference to the management of the pavements, but containing nothing material to the present question, except perhaps the declaration that the city's liabilities to the company in respect of the construction, renewal, repair and maintenance of roads shall be as defined by section 531 of the Municipal Act, except that the city is to indemnify the company against damages claimed by third parties by reason of neglect by the city to repair their portions of the streets.

The eleventh paragraph declares that the agreement is not to affect the rights of either party in respect of any of the matters referred to in the eighteenth resolution of the Easton agreement, set out in by-law 353, or any

Judgment.

MACLENNAN,
J.A.

Judgment. question arising out of the same, or in respect of any
MACLENNAN, matter not specifically dealt with in the agreement.
J.A.

The argument of the company is that this agreement does not touch their right to be paid for pavements subsequently constructed because the \$600 a mile is substituted in place of the actual cost, and that they continued to pay for construction as before, only by a different mode. By the former agreement, they were to pay the actual cost, not exceeding \$2.50 per yard; now they are to pay not the actual cost, but \$600 a mile for the whole mileage of the road. They point out that the new mode of payment is distinctly expressed to be in lieu of their liability for construction and renewal, and that it is accepted in full satisfaction of all claims in respect of construction or renewal. They also say that the stipulation for allowance by the arbitrators is not, and cannot be, affected by the agreement, because that is distinctly negatived and excluded by the eleventh clause.

It is not unfair, I think, to see what the effect would be if this contention were to prevail. There were just two and one-quarter years of the term yet to run. The mileage at the beginning of 1889 was fifty miles, and during the two and a-half years twelve more miles were added, total sixty-two. The total payments in mileage for the whole period would be about \$80,000, and this was, according to the argument, accepted in satisfaction not merely of the company's existing liability for past construction, renewal, maintenance and repair, not merely in satisfaction of all claims on account of debentures maturing after that date, and for claims for damages and costs suffered or paid by the city by reason of non-construction or non-repair by the company, but also in payment of the construction or renewals to be made by the city in the next two and a-quarter years. In other words the city agree to accept \$80,000 in satisfaction of large existing claims, and also of the construction account in the next two years, which amounted to the sum of \$167,000. Of course if parties choose by clear and distinct language to make such an

agreement they must adhere to it, and fulfil it, and the question is whether such is the clear meaning and effect of the agreement which the parties made in the present case.

Judgment.
MACLENNAN,
J.A.

Before the agreement the situation was that the company had either to construct, renew, maintain and repair those portions of the streets or to allow the city to do it; and if the city did it the company had to pay for it. They had either to do it themselves or to pay for it when done by the city, and therefore it was just that to the extent it was still good and serviceable when the term was ended it was to be valued to them and paid for to them. Now, however, all that is changed. They are no longer to be liable for construction, renewal, maintenance or repair. The city henceforth is to undertake all that, and is to be liable to the company for non-repair, as defined by section 531, and is to indemnify the company against damages to third parties for neglect to repair those portions of the street which formerly the company had to repair.

The circumstance which shews most strongly the change of situation effected by the agreement, and which also shews, as I think, that the construction which the learned Judge has put upon it is the only one which could be reasonably fair and just between the parties is this: Before the agreement, when a pavement was constructed the company paid for it and used it. When it was worn out it was the company's loss; they had been using and had consumed their own property. If it was renewed they had to pay for it again, and again they went on using and consuming it, and at the end of the term they were to get back, not what it had cost either for original construction or for renewals, but its value at that time so far as it was not worn out and used up. Again the pavements being either constructed by them or paid for by them, and also kept in repair by them or at their expense, they were in effect the company's property, and they paid nothing for the use of them. Now, however, the pavements to be constructed for the first time, or old ones which are to be re-

Judgment. renewed, are not to be either constructed or renewed by
MACLENNAN. them, but by the city. They are no longer to be the com-
J.A. pany's property, but the city's property. The old ones also
are henceforth to be repaired by the city, and for all this
it is just that the company should pay. It is the city's
pavements they are now using and wearing out and not
their own, and that is why they are to pay \$600 a mile.
The old pavements are still theirs, and such of them as
were of any value at the end of the term were valued and
allowed by the arbitrators. But constructions and re-
newals subsequent to the 1st January, 1889, not having
been either constructed or paid for by the company were
not their property as the others were, and did not come
within the meaning of the Act of 1877.

That, I think, is the natural and obvious meaning of the
language of the agreement. The mileage payment is to
be "in lieu of the company's liability for construction,"
etc. That is, the liability for construction is no longer to
continue. It is to be "in satisfaction and discharge of all
claims on the company in respect of construction," etc.
They are not only not to be any longer under any liability
to construct, etc., but there are to be no more claims for
construction or renewal, or maintenance, or repair, when
done by the city. I think it is put beyond all question or
doubt that this is the proper construction, when it is added
that henceforth all construction, renewal, maintenance and
repair are to be done by the city.

I think, therefore, the fair and reasonable meaning of
the language used is, that the company were no longer to
be liable to construct, renew, maintain, or repair pave-
ments, or to pay for so doing; and that therefore the pave-
ments in question were neither constructed nor paid for by
them within the meaning of section 5 of the Act of
1877, and that the judgment on this objection to the award
was right.

I am, therefore, of opinion that the appeal fails on all
the grounds, and should be dismissed.

OSLER, J. A. :—

Judgment.

OSLER,
J.A.

I agree in the result and substantially for the reasons assigned by my brother Robertson in the Court below.

BURTON, J. A. :—

The award between this city and the Street Railway Company was moved against on two grounds :

1st. Because the arbitrators refused to value the privilege or franchise claimed by the company after the expiration of thirty years, during which the city had the option to assume the ownership of the railway and the property used in connection with its working ; and

2ndly. Because they refused to value the permanent pavement constructed since the date of the agreement of January, 1889.

The appellants contended that the franchise conferred by the agreement was an estate in fee simple subject to divestment on the performance of three conditions precedent ; (a) the giving of the prescribed notice ; (b) the ascertainment by arbitration of the value of the railway and of all the real and personal property in connection with the working thereof ; (c) the payment of the amount so ascertained, and cited *Davis v. Memphis and Charleston R. W. Co.*, 39 Am. & Eng. R. W. Cas. 65, to shew that what the railway company acquired under their charter was a qualified or base fee ; but whatever the nature of the estate, it was " property " within the meaning of the agreement and should have been valued.

They contended further, that if this was not the meaning of the agreement, it would leave the city in the position, after purchasing the stock and other property of the railway, of being unable to operate it ; and the advisers of the city seem to have considered the question open to doubt, as by 52 Vic. ch. 73, sec. 13, they obtained legislative authority to operate it.

But I am of opinion that the case I have referred to, and

Judgment.

BURTON,
J.A.

the other cases referred to on the argument, have no application when we come to consider the actual facts of this case.

The original Act (18th May, 1861), incorporating Easton and his associates as a chartered company, authorized them to construct and operate a street railway on certain streets within the city of Toronto and an adjoining municipality, subject always to their obtaining the consent of such municipalities to construct the same within their respective limits, upon such conditions and for such periods as might be respectively agreed on between the company and the municipalities.

Without such consent the privilege or franchise, call it what we may, was non-existent; it was called into existence only when the agreement validated by the Act of the Legislature became operative and subject to its conditions, and whenever, in pursuance of the powers granted by the Legislature, the corporation of Toronto should pass a by-law for carrying the agreement into effect.

The agreement and the by-law expressly limit the grant of the privilege to thirty years, a defined and certain date; but they contain an additional provision that on notice six months previously to the expiry of that term, of the intention of the corporation to assume the ownership of the railway, and all real and personal property in connection with the working thereof, they may do so at a valuation.

It is true the agreement provides that if the corporation should fail to exercise its option of assuming the ownership the grant shall continue for a further period of five years, and so at the expiration of each succeeding five years, but that contingency never arose; we are dealing therefore with the license or consent given for that fixed term of thirty years, at the expiry of which, according to my reading of the agreement, the corporation having elected to exercise its option of purchasing, the privilege or franchise of the railway company ceased.

I am also of opinion that all the other lines besides those

referred to in the original agreement were referable to that agreement, and formed part of one system, and are subject to the same condition as to the period of the license, and the assumption at its expiration. I think therefore, that the arbitrators were justified in not placing a value on this so-called franchise.

Judgment.

BURTON,
J.A.

The other question as to the payment for the pavements may be more difficult of solution; and in order to construe the agreement of January, 1889, it becomes necessary to ascertain what were the relative rights and liabilities of the parties at that time and to trace the liability as it originally existed and was changed from time to time.

The original agreement provided that the roadway between and within and at least one foot six inches from and outside of each rail shall be paved or macadamized and kept constantly in good repair by the said Easton, who shall also be bound to construct and keep in good repair crossings of a similar character to those adopted by the corporation within the limits aforesaid, at the intersection of every such railway track and cross streets.

Things remained in this position until the city obtained legislation in 1876 imposing considerable additional obligations on the company and amended the previous Act as follows:

"(1) The said Toronto Street Railway Company in repairing the roadway between their rails and for one foot six inches on the outside of each rail, shall, within the city of Toronto, be bound to use for such repairs the same materials and mode of construction as that from time to time in use by the city corporation for the remainder of the street, unless and while the compliance with this condition is in the opinion of the city engineer for the time being of the city of Toronto impracticable by reason of such remainder of the street not being so constructed or in such state as will enable the said company to comply therewith, and where the material laid down upon such remainder of the street is macadam or gravel, it shall be optional with the said the Toronto Street Railway Company to use stone paving.

Judgment.

BURTON,
J.A.

(2) Where block pavement is now in use and whenever the corporation of the city of Toronto makes a change in the kind of pavement for the time being in use on any of the streets traversed by the said railway, they shall be bound in the first place to construct, and when the same shall be worn out to renew, the pavement on that part of the street which the said company is bound to repair as aforesaid.

(3) Subject to the provisions hereinbefore contained, should the said railway company neglect to keep the track, or roadway, or crossings, or the space of eighteen inches on the outside of the rails in good condition, or to have the necessary repairs made thereon, the city engineer or other proper officer shall give written notice at the head office of the company, requiring the said repairs to be made forthwith, and unless such repairs are commenced within five days and carried on with all reasonable despatch to the satisfaction of the city engineer, the said engineer may cause such repairs to be made at the expense of the city, and the amount so expended shall be recoverable against the said company in any court of competent jurisdiction."

This was followed by further legislation at the instance of the city in the following year, imposing still greater burdens upon the company, but the only material matter in this connection would seem to be the following :

"4. In every case of construction or renewal of any kind of permanent pavement upon any of the streets occupied by the said railway company, the said company shall have the option of constructing their portion of any such pavement, or, at their request, the said corporation of the city of Toronto shall construct the same, and in every such case the said corporation shall assess an annual rate, covering interest and sinking fund, extending over the like period as that upon which the assessment upon the adjacent rate-payers is adjusted, upon the said company for the cost thereof not exceeding the said sum of two dollars and fifty cents per square yard, with full power to the said corpora-

tion to raise such sum by an issue of debentures and to collect the same in the manner provided under the Municipal Act for the construction of local improvements.

Judgment.

BURTON,
J. A.

5. If the corporation of the city of Toronto shall at any time elect to assume the said railway under the provisions of the agreement and by-law in that behalf, the arbitrators appointed to determine the value of the real and personal property of the said company shall also estimate as an asset of the said company the value to the said company of any permanent pavement hereafter constructed or paid for by the said company for the balance of the life of the said pavement."

It would seem therefore that whether the construction and repairs were done by the company or by the corporation, the liability of the company was to be limited to \$2.50 per square yard, and by whomsoever constructed was, on the taking over of the railway by the city, to be valued to the company as an asset of the company for the balance of the life of the payment.

This then was the position of the parties previous to January, 1889.

The corporation had assumed to do the work which the company by its agreement was bound to do to the extent of \$2.50 per square yard. The corporation as agents of the company did the work, and issued debentures running over a period of ten years, for the payment of which and interest they assessed the company, and by the terms of the statute the work so done by the corporation became an asset of the company, and to be allowed to them on the valuation; but complaints had arisen on both sides, and litigation ensued, and that litigation was settled upon terms.

The company agreed to pay the assessments of 1887 and 1888.

From that time a new arrangement was made; the company instead of paying the future assessments was to pay a fixed sum of \$600 per mile per annum for single track, and \$1,200 per mile for double track; which is also expressed to be for the remainder of the term of their charter. The question is, what is meant by those words.

Judgment.

BURTON,
J.A.

I have been unable to convince myself that they mean more than this. Hitherto the city has undertaken to do this work, as the agents of the company, in consideration of certain assessments. They now propose to do the same work for a certain fixed sum ; but beyond this, the rights of either party are not to be affected. One of these rights—and a very important right it was—was that the work though done by the city, was to be an asset of the company, and included in the valuation, and is not to be taken from them, except by very plain and unequivocal language. I find no such language here.

Clause four of the agreement does not appear to me to militate against this construction. I give it in full :—

4. The said payments shall be accepted by the city in full satisfaction and discharge of all claims upon the company in respect of the construction, renewal, maintenance and repair of all the aforesaid portions of the said streets, and also in respect of all claims by the city upon the company for damages and costs suffered or paid by the city by reason of the non-construction or non-repair thereof by the company ; and hereafter the city shall undertake the construction, renewal, maintenance and repair of all the aforesaid portions of the said streets, but not of the company's tracks, ties and stringers.

The company were, as things then stood, under a liability under the first agreement to construct and repair these portions of the streets. They did not of course wish to be exposed to a second liability of paying \$1,200 per mile per annum, and still continue liable to do the work.

I think that the settlement was intended to be in full satisfaction on both sides for all claims and damages up to the date of the agreement ; that a fixed sum was agreed upon in place of the assessment.

I think this is the plain meaning of the words, but I think all doubt is removed when we come to clause eleven, which is as follows : " This agreement is not to affect the rights of either party in respect of any of the matters referred to in the eighteenth resolution set out in by-law 353

of the city of Toronto, or of any question arising out of the same, nor in respect of any matter not herein specifically dealt with, nor shall this agreement have any operation beyond the period over which the aforesaid franchise now extends."

Judgment.
BURTON,
J.A.

This being one of the matters coming within the eighteenth resolution, and not being specifically dealt with, is not to be affected by the agreement; it is a right, as I have said, a very valuable right, and is saved by this section to the company.

I think, therefore, that to this extent the judgment should be varied, and the award referred back for a valuation.

I have come to this conclusion upon the construction of the agreement itself without reference to the printed book of minutes, correspondence, etc., to which we were referred upon the argument.

I quite agree that that book can be looked at only for the purpose of considering the surrounding circumstances, with the view of ascertaining the meaning of the words actually used in the completed agreement—used as they were with regard to the particular circumstances and facts in connection with which they were used; and that the previous negotiations, whether by correspondence or verbally, cannot be looked at to control the contract. I did not look at them at all before arriving at a conclusion; but I have since referred to them to see if they are at all inconsistent with that conclusion; and I do not think there is anything inconsistent with that view.

The corporation claimed \$1,000 a mile, the company insisted that the work could be done for \$400, and offered to do it for that sum.

The company offered to pay \$500 per mile. The mayor refused, as that would yield only \$25,000, whereas he claimed that under the assessment, the city was then receiving an annual sum of \$30,000. The company finally agreed to pay \$600 per mile, which would yield just that sum.

Argument. 6 of this Act, as amended by 51 Vic. ch. 83, sec. 2 (O.), gives the Church power to take by devise notwithstanding the provisions of the Religious Institutions Act. By the section in question all the powers of the Connexional Society of the Wesleyan Methodist Church in Canada were vested in the Methodist Church, and that society by 14 & 15 Vic. ch. 142, had power to take by devise, so that the Methodist Church are now entitled to the benefit of the devise in question.

R. M. Macdonald, for the respondent. The Methodist Church cannot take the benefit of this devise. If any one is entitled it is the society specifically named in the will, which is a body still in existence. It was incorporated by 35 Vic. ch. 117 (D.), and the name was altered by 46 Vic. ch. 95 (D.), but it still exists notwithstanding the consolidation of the Churches. Under the Act of Incorporation of that society the laws respecting devises of real estate to religious corporations apply, and therefore the society mentioned cannot take. If however the Methodist Church is entitled to the benefit of the request then they too must fail, for section 10 of their Act of Incorporation, 47 Vic. ch. 106 (D.), leaves them subject also to the laws respecting devises of real estate to religious corporations. Section 6 of the Ontario Act does not modify this restriction or give to the Methodist Church the general power formerly possessed by the Connexional Society, but simply confers upon the Methodist Church the power of taking land by devise for the purposes for which the Connexional Society was created. See *Smith v. Methodist Church*, 16 O. R. 199.

C. J. Holman, for the executors.

Maclaren, Q. C., in reply.

January 17th, 1893. HAGARTY, C. J. O. :—

In 1851, the "Connexional Society of the Wesleyan Methodist Church in Canada," was incorporated (14 & 15 Vic. ch. 142), and allowed to take and hold lands by "grant,

devise, or otherwise." There was a clause requiring deeds of land to be registered within twelve months. No provision is made as to "devises."

Judgment.

HAGARTY,
C.J.O.

At that time lands could not be devised except under special powers in Acts of Incorporation.

The declared purposes of that Society were: (1) the publication, etc., of books, etc., for diffusion of general knowledge; (2) the support of aged and infirm ministers, and their widows and children.

In 1874 this Act was amended by substituting the name of "The Methodist Church of Canada," wherever the words "Wesleyan Methodist Church in Canada" appear: 38 Vic. ch. 78 (O.).

In 1872 the "Missionary Society of the Wesleyan Methodist Church in Canada," was incorporated under that name: 35 Vic. ch. 117 (D.). They had power to take by devise, but subject to the provincial laws respecting real estate in force at the time of the devise.

In the next year (1873) the Ontario Legislature authorized devises of real estate, but required them to be made at least six months before death: 36 Vic. ch. 135, sec. 20.

In 1883 this Missionary Society Act was amended, and the name was changed to "The Missionary Society of the Methodist Church of Canada;" all its rights and obligations to continue under the new name: 46 Vic. ch. 95 (D.).

Section 6 gives them power to take by devise to a limited annual value, subject to the provincial laws respecting devises of real estate to religious societies.

In 1884 the Dominion Parliament passed the Act (47 Vic. ch. 106) incorporating "The Methodist Church" with powers to hold all the property, etc., of the four denominations asking for union and incorporation; vesting in it all the estate belonging to or held in trust for any of these denominations.

Section 5 enables them to take and hold real or personal estate by virtue of any devise by will, such devises to be subject to provincial laws respecting devises to religious corporations in force at the time of the devise.

Judgment.

HAGARTY,
C.J.O.

Section 15 provides that property hereafter vested in the corporation or previously held in trust for missionary purposes shall until altered on the basis of union by the General Conference be held on similar trusts and purposes.

Section 20 provides that nothing in the Act is to prejudice or affect any existing right or interest in the superannuation fund of any of the four denominations, or any cause of action in respect thereof.

Schedule A (4) to the Act provides for a general superannuation fund to be formed under separate boards.

Sub-division 2 provides one missionary fund for the whole church, on the consummation of the union, and declares that "The Missionary Society of the Methodist Church of Canada" having no debt, no recommendation was necessary.

This Act (47 Vic. ch. 106) came into force on the 1st of June, 1884. A month before this the Ontario Legislature passed an Act (47 Vic. ch. 88) reciting the pending application for incorporation in the Parliament of Canada. It ratifies the union so far as it lawfully can.

Section 2 provides that as soon as the Dominion Act comes into force, all the property of the said denominations in Ontario, held in trust for any of them or under their control, shall be vested in "the Methodist Church."

Section 6 provides that the said corporation shall have for the purposes and objects thereof, all the powers, rights, privileges, and franchises conferred upon the Connexional Society of the Wesleyan Methodist Church of Canada by 14 & 15 Vic. ch. 142, as amended by 38 Vic. ch. 78.

Section 7 relieves deeds previously executed for the uses, etc., of any of the denominations from being held void for nonregistration within twelve months.

I am of opinion that the words used in the will "to the Missionary Society of the Methodist Church in Canada," are sufficiently clear to vest the property in the corporation known as "The Methodist Church," for missionary purposes, apart from the objection hereafter to be considered as to the testator dying within the six months of the making of the will.

The words "in Canada," may be regarded as used merely in a geographical sense, and not as part of the corporate name.

Judgment.

HAGARTY,
C.J.O.

Then it is objected that there is no such corporation or body as "The Missionary Society of the Methodist Church."

From the passing of the Act of 1872 there was a corporate missionary society of the Wesleyan church, with power to take and hold by devise; and in 1883 its name was altered to meet the change to "The Methodist Church." It could hold lands for the church named.

But I think this society was merged as to its continued corporate existence by the Act of 1884, passed by Parliament, and also by the Ontario Legislature, or at all events its lands passed into the disposal of the Methodist Church, and subject to the General Conference and the government of the new corporation. And, as already noticed, we find in the schedules attached to and set out in the Act of 1884, the direct recognition of a body called "The Missionary Society of the Methodist Church of Canada," one of the four uniting bodies.

In this state of the statutory law, I cannot hold that the devise in this will does not in sufficiently plain and direct terms point out the object of the gift, viz.: "The Methodist Church," or its branch, board, or body in charge of, or managing, its missionary department.

I understand that the Courts have always looked favourably on the construction of charitable devises, not defeating them by a technical scrutiny into the strictly legal description of the object, so long as there could be no reasonable doubt as to the identity of such object.

I have no doubt whatever of this being a devise to the Methodist Church for its missionary purposes.

From the vast number of cases on the subject we may deduce the principle that the courts have always construed these gifts with large liberality.

Mr. Tyssen's work on Charitable Bequests seems the latest and fullest authority. Chapter 2 on devises to corporations gives a full review of decisions. He notices

Judgment. Lord St. Leonard's decision in *Incorporated Society v. Richards*, 1 Dr. & W. 258, that there was at all times an inherent jurisdiction in equity in cases of charity and that a court of equity "has at all times interfered to make good that which at law was an illegal or informal gift."

HAGARTY,
C.J.O.

His list of authorities begins at p. 12.

In *Attorney-General v. Mayor of Rye*, 7 Taunt. 549, there was a devise to the right worshipful the mayor, jurats and town council of the ancient town of Rye. The correct name was "the mayor, jurats and commonalty of the ancient town of Rye." There was no town council. On a case submitted to four judges, Gibbs, C. J., said that the cases shewed that if the intent appeared to give to the corporation of Rye they should take though ill-named.

Tysen, chapter 21, is very full as to doubtful or defunct societies.

I especially refer to *In re Kilvert's Trusts*, L. R. 7 Ch. 170, before the Lords Justices; *In re Alchin's Trusts*, L. R. 14 Eq. 230; *Wilson v. Squire*, 1 Y. & C. C. C. 654; *Coldwell v. Holme*, 2 Sm. & G. 31; *Re Briscoe's Trusts*, 26 L. T. N. S. 149; *In re Fearn's Will*, 27 W. R. 392.

A large number of American authorities are collected in the American edition of Jarman, vol. 1, p. 378 (note).

But I am compelled to agree with my brother Maclellan, whose careful analysis of the statutes I have perused, that the bequest fails, as, on the law then existing, it was not made six months before the death of the testator.

I agree with the result arrived at by the learned Chancellor in *Smith v. Methodist Church*, 16 O. R. 199.

The appeal must be dismissed.

BURTON, J. A. :—

I agree with my brother Maclellan that the devise is inoperative in this case and the defendants incapable of taking, even if the proviso to section 10 of the Dominion Act of 1884 had been omitted. The power to take lands by

devise must of necessity be restricted by such laws as the province chooses to enact in reference to devises. I think that the law of Ontario at the time of this devise required the devise to be made at least six months before the death of the testator.

Judgment.
BURTON,
J. A.

I offer no opinion, therefore, upon the other question.

J. A.:—

The powers of the appellants, the Methodist Church, to take land by devise generally are, by their Act of Incorporation, expressly declared to be subject to the law respecting devises of real estate to religious corporations in force at the time of such devise in the province in which such real estate is situate. This is now found in R. S. O. ch. 237, section 23 of which provides that the devise must have been made at least six months before the death of the testator. These appellants, however, contend that the effect of section 6 of 47 Vic. ch. 88 (O.), is to enlarge their powers in this respect, and to enable them to take lands by devise for all purposes free from the restrictions as to time imposed by the general law. I cannot agree with this contention. The question was very fully considered by the present Chancellor in the recent case of *Smith v. The Methodist Church*, 16 O. R. 199, where it was held that on the true construction of the section the appellants' enlarged powers to take lands by devise were those only which had been conferred upon the Connexional Society of the Wesleyan Methodist Church in Canada by 14 & 15 Vic. ch. 142, for the purposes and objects of that Act, namely, for the publication and circulation of periodicals and books for the diffusion of useful knowledge; and, secondly, for the support of aged and infirm ministers, and the widows and children of ministers.

I cannot usefully add anything to the reasoning by which the learned Chancellor arrives at that conclusion, though I think the intention of the Legislature not to

Judgment. the recipient of his bounty must have been this incorporated society. I think, however, that this argument is not entitled to prevail, for two reasons: In the first place, it appears from the Act of 1884, incorporating the Methodist Church, that all the funds and property of the incorporated missionary society referred to were transferred to and vested in the new church corporation; and also that the work which the missionary corporation did was thenceforth to be done by the new church corporation. That being so, the missionary corporation was superseded, and became in effect defunct and extinct, and could no longer be supposed to be the object of a gift or bequest. But besides it is important to notice that the testator does not use the exact corporate name of the missionary corporation. He uses the words "in Canada" and not "of Canada," whereby any argument from identity of name is greatly weakened. It is sufficient, however, in my opinion, to say that there was not at the date of the will any society in practical existence reasonably answering the description used by the testator but the appellants, and that the appellants do sufficiently do so.

The other question is whether The Methodist Church has power to take the gift in question, so far as it consists of realty, the testator having died within a month after making his will. This is the point which the learned Chief Justice has decided adversely to the church corporation, and which remains to be considered.

It having been decided at an early period in *Doe Anderson v. Todd*, 2 U. C. R. 82, that the Act of 9 Geo. II. ch. 36, was in force in Upper Canada, religious societies were wholly incapable, without express legislative sanction, of taking or receiving testamentary gifts of land or of money charged upon land. The Act 9 Geo. IV., ch. 2, authorized them to take grants by deed of parcels of land for the site of a church and burying ground, provided the conveyance was registered within twelve months and the parcel did not exceed five acres; but it was not until 1873 that such societies were authorized to take gifts of land by will.

In that year, by the Act 36 Vic. ch. 135, sec. 20, religious societies or congregations were empowered to take lands and tenements or interests therein by devise or bequest if the same were made at least six months before the death of the testator. It was, however, enacted that the total annual value of lands taken by any such society by gift, devise, or bequest should not at any time exceed \$1,000, that no such lands should be held for a longer period than seven years, but should be disposed of within that period and the proceeds invested in securities not including mortgages; and that lands not disposed of within the time so limited should revert to the donor, his heirs, executors, administrators or assigns. This enactment continued to be the general law governing gifts of land and interests therein to religious corporations from 1873 until after the death of this testator. Therefore if this testator had lived for six months after making his will the present gift would have been good and no question could have arisen; but as he died within the six months the church corporation must make out that they have some independent statutory authority to receive the gift without being subject to the six months' restriction. The argument is that this authority was given to them by section 6 of the Act of Ontario, 47 Vic. ch. 88. It is quite clear, and indeed is not disputed, that before that enactment the various Methodist churches were subject in this matter to the general law mentioned above as having been first established in 1873, and stood on no different footing from the other religious bodies of the province, with one exception. That exception was this: In 1851, by the Act 14 & 15 Vic. ch. 142, a society called "The Connexional Society of the Wesleyan Methodist Church in Canada" was incorporated. It is entitled an "Act to Incorporate the Benevolent Societies of the Wesleyan Methodist Church in Canada." It recites that certain ministers and members of that church had established themselves together under a constitution creating and establishing "The Book and Printing Establishments," "The Annuitant Fund Society," and "The Super-

Judgment.

MACLENNAN,
J.A.

Judgment. annuated or Worn-out Preachers' Fund," and that they
MACLENNAN, had given or promised to give lands for the following
J.A. objects : (1) For the publication and circulation of periodicals and books for the diffusion of useful knowledge; and (2) For the support of aged and infirm ministers and the widows and children of ministers. It further recites that it would tend to promote the purposes of the association to be incorporated and to be empowered to hold property in mortmain, and to manage it for the uses and purposes agreed. It is then enacted that certain named persons and the other members of the association and persons afterwards elected should be incorporated by the name above mentioned, and should be capable of receiving and taking by grant, devise, or otherwise, any lands or interests therein, and also goods, etc., for the use and support of the association, and it was provided that the corporation should hold the rents and profits of the lands for the purposes aforesaid, and no other; and also that the whole annual value of the society's lands should never exceed £5,000.

In the year 1874 the Wesleyan Methodist Church in Canada united with two other Methodist bodies by the name of "The Methodist Church of Canada," and by an Act of Ontario of that year, 38 Vic. ch. 78, it was declared that all property held by or in trust for any of the uniting churches, was vested in trust for The Methodist Church of Canada. It was also declared, by section 8, that for the future the powers of the Act incorporating the Connexional Society should be held to apply to the united church, and that the name of the United Church should be substituted in the Act for the Wesleyan Methodist Church in Canada. There is no reference in either of these Acts to the missions of the church, which were, as already mentioned, carried on by a defunct corporation. The business of the Connexional Society was confined to the book and publishing business, and the benevolent funds of the church; but for these purposes it had power to take lands by will to the amount of £5,000 annual value independently of the date of the testator's death.

The missionary corporation of the church on the other hand never had unrestricted power to take real estate by devise. It was first incorporated, as we have seen, in 1872, by Dominion Act, 35 Vic. ch. 117, and that Act, by section 6, gave the society power to take devises of real estate to the annual value of \$10,000 ; but the power was made expressly subject to the laws of the province respecting devises of real estate to religious corporations. At that time in Ontario such corporations had no such power, and did not receive such power until the following year.

Judgment.
MAOLENNAN,
J.A.

Moreover, when the Missionary Corporation Act was amended by 46 Vic. ch. 95 (D.), so as to make it the Missionary Society of the Methodist Church of Canada, while the limit of annual value was raised to \$50,000, the same restriction upon its power to accept devises of land was retained, and it still remained subject to the restriction in the Act relating to the property of religious societies. The language of the proviso was as follows: "Provided always that such devises of real estate shall be subject to the laws respecting devises of real estate to religious corporations which are in force at the time of such devise in the province or territory in which such real estate is situate."

We see now how the Methodist Churches stood in 1884, when the final union took place, which united them all by the name of "The Methodist Church," with reference to the power to take real estate by devise. It was as follows: By the Act relating to the property of Religious Institutions, R. S. O. (1877), ch. 216, sec. 19, all religious societies could take land by will made six months before death ; but the aggregate annual value was restricted to \$1,000 ; and there was an obligation to sell and dispose of it within seven years, under penalty of forfeiture. The Connexional Society of one of the churches, that is, the Methodist Church of Canada, had an unrestricted power to take lands by will for the bookroom business and the benevolent schemes of the church, but for no other purpose, up to \$20,000 annual value ; and the missionary corporation of the same church had power to receive to the amount of

Judgment. \$50,000 per annum, but subject to the restrictions which
MACLENNAN, applied to other religious societies.

J.A.

Under these circumstances, the churches having agreed upon their union, applied to Parliament for an Act of incorporation. While this application was pending, they also applied to the Ontario Legislature for an Act, not of incorporation, but to ratify the union, and to vest in the united church as soon as it should be incorporated the property situate in Ontario, which was vested or held in trust for the several uniting churches; and also, as is expressed in the preamble, to confer such further powers as might be requisite. This Ontario Act was obtained, and it was passed on the 25th of March, 1884, but was declared to go into effect on the 1st of June. The Dominion Act was passed and went into effect on the 19th of April, 1884. The Dominion Act incorporated all the members of the uniting churches present and future by the name of "The Methodist Church." It declared that the objects of the corporation were set out in the basis of union, which was made a schedule to the Act. By section 4 it was declared that all the real and personal estate belonging to or held in trust for either of the churches, or in trust for or to the use of any corporation under the government or control of any of the churches, should thenceforth be held by and vested in the church corporation, and should be used and administered for the benefit of the Methodist Church.

I think it is evident from an examination of the whole Act, including the basis of union, that the intention and effect of this section 4 was to vest in the church corporation all the property, real and personal, which theretofore belonged to the Connexional Society for its several purposes, and also the funds and property of the missionary corporations of the Methodist Church of Canada, and I think that from the passing of the Act the last mentioned corporations became defunct, and it was intended that the functions performed by them respectively should thenceforth be performed by the church corporation. It is specially provided in the basis of union that after union

there shall be but one missionary fund for the whole united church, and there are also special provisions concerning the bookrooms and the benevolent funds.

Judgment.

MACLENNAN,
J.A.

The Act of Incorporation then provides by section 10 that the corporation, that is the new church corporation, shall be capable of taking land by devise, but subject to a proviso that every such devise shall be subject to the laws respecting devises of real estate to religious corporations in force at the time of such devise in the province in which such real estate is situate, *so far as the same apply to the said corporation.* This proviso is, with the exception of the words in italics, in the very language of the proviso which qualified the right of the missionary corporation to take land by devise. Putting out of sight for the moment the Act which had just been passed by the Ontario Legislature, it could not be disputed that by the effect of this proviso the corporate power of the church to take land by will was restricted in the manner and to the extent expressed in the Religious Institutions Act, and that the restriction would apply to gifts by will for any purpose whatever, even for the bookroom or for benevolent purposes, and unless that restriction is removed, either in whole or in part, by section six of the Ontario Act, it must still apply. What then is the true construction of section six?

Section two had transferred to the new corporation all the property of the Connexional Society, and that being done, section six was enacted to transfer to the new corporation the powers, etc., which had belonged to the old; and taking the two sections together, I think the purpose and effect of the legislation was to substitute the new corporation for the old for the purposes and objects of the old, that is to say the carrying on the book business, and the management of the benevolent funds of the church. It was not intended that the important business of publishing and selling books, and the management of the benevolent funds which had been conducted by the Connexional Society should come to an end; but the intention was that the new church corporation should continue to do these

Judgment. things for the future. It was therefore not sufficient to
MACLENNAN, transfer the property, but it was necessary to give the new
J.A. corporation proper business powers, and so by section six the powers, etc., of the old corporation were given to the new. It is evident that without such powers and franchises a mere church corporation could not carry on such business or administer benevolent funds. These powers were considered necessary, and were used by the old company for carrying on their business, and they were given to the new for the same purposes. The intention of sections two and six was, as I think, to place the new corporation with reference to the connexional property and business in the same position exactly as the old, and nothing more.

I therefore think the "purposes and objects" mentioned in the statute are the purposes and objects of the old corporation which for the future are to be carried on by the new. In *Smith v. The Methodist Church*, 16 O. R. 199, the learned Chancellor construed these words as meaning, not the purposes and objects of the Methodist Church, but the purposes and objects of the Connexional Society, and he reasons that conclusion out with great cogency. I have come to the same conclusion but by a somewhat different process. I think that, having regard to the purpose of the section as a whole, the rights and powers conferred thereby, when they come to be exercised by the church corporation, must be confined in their hands as they were in the hands of the Connexional Society, namely to the business which that society was authorized to carry on and perform. I think too that the word "thereof" may be construed grammatically to refer neither to the Methodist Church nor to the Connexional Society, but to the powers, etc., themselves, and that the Legislature may be regarded as saying "whatever were the purposes and objects of the powers, etc., possessed by the Connexional Society, the new corporation shall have the same powers for the same purposes and objects." The inquiry is, what were the purposes and objects "thereof,"

that is of the powers, etc., possessed by the Connexional Society? The answer is the book and publishing business and the management of the benevolent funds. It follows from this argument clearly, as I think, that section six did not give the church, with reference to its missionary funds, exemption from the provincial law as to testamentary gifts of land.

Judgment.
MACLENNAN,
J.A.

There is, however, another argument which I think compels us to the same conclusion. In expounding section six we must have regard to the general Act relating to such devises, and also to section 10 of the Dominion Act incorporating the church which are *in pari materia* with the section.

The Connexional Society obtained power in 1851 to take land by will. In 1873 all religious societies were empowered to do the same thing, if the will were made six months before death. Then came section six giving this religious society the power possessed by the Connexional Society, that is a power to take land by will. The Religious Societies Act was a general Act applicable to all religious societies. It had continued on the statute book from the year 1873. It had relaxed partially in favour of religious societies the stringent provisions of the Act of Geo. II. which prohibited altogether testamentary gifts of land to be made to charities.

When the power was given by the Connexional Society Act, there was no general Act in existence allowing such gifts to any extent. The disability was absolute, and therefore the power being given without restriction, was necessarily without qualification of any kind. Does it necessarily follow, however, that when the same power, that is, the simple power to take land by devise, is given to the church corporation, it is, without express words, to be free from the restrictions contained in the general Act? The power is given, not in express terms, but as included in the general word "powers," contained in the section; all the powers are given, and this being one of them, it is included. Without this clause, however, the church would have, by

Judgment. virtue of the general Act, power to take land by devise;
MAOLENNAN, that is, some power, a qualified power; and I think, if,
J.A. instead of clause six, the Act had said in express terms that the church corporation should have power to take land by devise, it could not be argued but that the power so conferred would be subject to all the restrictions and provisions of the general Act.

I think the general Act is indicative of the settled policy of the Legislature as regards gifts of lands to religious societies, and that we ought not to imply a change of that policy or an intention to exempt this particular society from its operation. There is nothing in the Act indicating that the parties applying for it desired, or that the Legislature in passing it meant, to free the Methodist Church from the restrictions of the general law. That conclusion depends altogether upon inference, and the proposition is that because the mere power is given it must necessarily mean free from the restrictions applicable in all similar cases. I think the implication is just the other way, and that the gift of the power, if it can be regarded as included in the words used, must be held to be subject to the general law.

But even if it should be considered doubtful upon a consideration of the general Act and section six alone, when section ten is called in to aid the construction in my judgment it sets the matter wholly at rest. The Dominion Act was passed after section six. It is the Act of incorporation on which the church depends for its corporate existence. It is the final declaration of Parliament on the subject.

By section ten capacity to take land by devise is expressly conferred, but it is made distinctly subject to the provincial law, so far as the same applies. It cannot be denied that the Ontario Act does apply to this corporation as a religious society, and therefore the appellants are by the very terms of the law which gives them existence as a corporation subject to it. Reading section six and section ten together, the first gives them power to take lands by will, the other makes them subject to the general pro-

vincial law, and thus full effect is given to the plain terms of both sections. Judgment.

MACLENNAN,
J.A.

I am therefore compelled to hold that the power of the appellants, the Methodist Church, to take land by devise is subject to the provisions of section 22 of the Act relating to the property of Religious Institutions, R. S. O. ch. 237, that the gift in question is void and that the judgment ought to be affirmed.

Appeal dismissed with costs.

HOWARD V. HERRINGTON.

Jurisdiction—Replevin—Tax collector—Venue—County Court—R. S. O. ch. 55, sec. 4—R. S. O. ch. 73, sec. 15.

A tax collector sued for damages in respect of acts done by him in the execution of his duty is entitled to the benefit of R. S. O. ch. 73, and under section 15 of that Act, and section 4 of R. S. O. ch. 55, a County Court action against him for replevin of goods seized by him and for damages for malicious seizure, must be brought in the county where the seizure and alleged trespass took place.

The Consolidated Rules as to venue do not override these statutory provisions.

Legacy v. Pitcher, 10 O. R. 620, distinguished.

Arscott v. Lilley, 14 A. R. 283, applied.

Judgment of the County Court of Hastings reversed.

THIS was an appeal by the defendant from the judgment of the County Court of Hastings. Statement.

The plaintiff was a farmer living in the township of Brighton, in the county of Northumberland. The defendant was a collector of taxes for that township, and seized for taxes, amounting to \$37.12, alleged to be due by the plaintiff, two of his horses. The plaintiff brought this action in the County Court of Hastings for replevin, claiming also damages for alleged illegal and excessive distress.

Judgment.

OSLER,
J. A.

Court of Hastings had no jurisdiction to try the action as to either of the causes of action set forth in the statement of claim. I am of opinion that the defendant's contention in this respect is well founded. As regards the replevin: Section 19, sub-section 5, of the County Courts Act (R. S. O. ch. 47), enacts that County Courts shall have jurisdiction in actions of replevin where the value of the goods or other property or effects taken or distrained does not exceed the sum of \$200, as provided in the Replevin Act; and the 4th section of that Act (R. S. O. ch. 55), headed "Replevin in County Courts," enacts that "in case the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of \$200, and in case the title to land is not brought in question, the action may be brought in the County Court of any county wherein the goods or other property or effects have been distrained, taken or detained." The effect of these two provisions clearly is not only to limit the general jurisdiction in replevin to the case where the goods distrained do not exceed \$200 in value, but also to confine it to the County Court of the particular county in which they have been distrained, taken, or detained. We were of that opinion in *Hoover v. Craig*, 12 A. R. 72 (1885), though it did then become actually necessary to decide the point. The plaintiff contends that the effect of Consolidated Rules, part 20, "Trial," Rule 653, and of 51 Vic. ch. 2, sec. 4, "An Act respecting the Revised Statutes of Ontario," is to alter the law in this respect. The rule, which is taken from, and is the same as, O. J. Act, 1881, Rule 254, provides that there shall be no local venue for the trial of any action except an action of ejectment, but the plaintiff shall, in his statement of claim, name the county town in which he proposes that the action should be tried; and the action shall, unless a judge otherwise orders, be tried in the place so named; (a) on grounds shewn by affidavit a judge may order that the trial of an action of ejectment shall take place at any other place than that named in the statement of claim.

Section 4 of the Act of 1888 confirms the Consolidated

Rules "as if the same were herein repealed and re-enacted," and repeals all inconsistent enactments, "which said Consolidated Rules * * shall like other rules of the (Judges of the Supreme Court of Judicature) be subject, to be annulled or altered from time to time by new rules of Court to be made under the authority of the Judicature Act." These provisions, however, appear to me not to touch the point at issue. The question is one primarily of jurisdiction, not of venue or of practice and procedure, which is all that the Consolidated Rules purport to deal with, or that the Judges under the O. J. Acts, 1881 or 1887, or the Act of 1888, are empowered to deal with. I do not see that under Rule 1260 there would be power to change the place of trial from one county to another, in a case thus brought in a County Court which had no jurisdiction to entertain it. I mean that this rule does not aid the plaintiff, as it assumes that the action, which is to be transferred to another County Court, is properly pending in the County Court from which the proceedings are to be removed. Possibly the plaintiff might, before judgment, have had the cause removed into the High Court as provided by 54 Vic. ch. 14 (O.), but on this appeal all that we can consider is whether the Court below had jurisdiction.

Then as regards the other branch of the action: An action against a tax collector for an excessive distress is unusual; indeed, so far as I am aware, without precedent; but I do not see why on principle it may not lie against him, on the plain words of the statute of Marlbridge. He is nevertheless entitled to the protection of R. S. O. ch. 73: "An Act to protect justices of the peace and others from vexatious actions." The plaintiff must allege and prove that the act complained of was done maliciously and without reasonable or probable cause, and other provisions of the Act for the convenience, relief and protection of the officer, such as giving notice of action, trial of the cause in the county where the act complained of was committed, etc., must be complied with.

Judgment
OSLER,
J.A.

Judgment.

OSLER,
J. A.

I think there is an utter absence of any evidence of malice on the part of the defendant on the plaintiff's own shewing. He appears to have been actuated simply by a desire to do his duty, and to do it in such a way as to be least annoying to the plaintiff. The case should therefore have been withdrawn from the jury. The defendant is also, in my opinion, entitled to rely upon section 15 of the Justices Act, which enacts that "Every such action shall be tried in the county where the act complained of was committed; and in actions in county or division courts the action shall be brought in the county or division within which the act complained of was committed, or within which the defendant resides, and the defendant may plead not guilty by statute, and may at the trial of the action give any special matter of defence, excuse or justification in evidence." And section 20 enacts that if at the trial of the action the plaintiff does not prove (*inter alia*), where the plaintiff sues in a county, district or division court that the cause of action arose within the county, district or united counties for which such court is holden, then, and in every such case, the plaintiff shall be nonsuited, or a verdict shall be given for the defendant.

Section 15 is expressly pleaded, but the plaintiff contends that it was no longer a defence in consequence of the rule abolishing local venue, and of the Act of 1888, already referred to, confirming it, and repealing inconsistent enactments. I think the contention cannot prevail. The Revised Statutes of 1887 were passed after the introduction of the rule in its present form in the O. J. Act, 1881, and, as if to remove any doubt which might be suggested by its phraseology, the 15th section of the Justices Protection Act, instead of adopting the language of section 11 of the corresponding Act in the revision of 1877, that "in every such action the venue shall be laid in the county where the act complained of was committed," enacts that "every such action shall be tried in the county," etc., thus as it seems to me pointedly declaring the intention of the Legislature to preserve to the persons coming

within the Act the special right or privilege of having actions brought against them tried in the county where the act complained of was committed, or, in county or division court cases, in the county where the defendant resides.

Judgment.

 OSLER,
 J.A.

The rule deals merely with general practice and procedure on the subject of venue, and cannot have the effect of altering the rights of individuals under a special Act of the Legislature. I think that the decisions upon the rules as to costs lead to this conclusion: *Garnett v. Bradley*, 3 App. Cas. 944; *Hasker v. Wood*, 54 L. J. Q. B. 419; *In re Mills' Estate*, 34 Ch. D. 24; *Reeve v. Gibson*, (1891) 1 Q. B. 652; *Arscott v. Lilley*, 14 A. R. 283. In view of the fact that in the Revised Statutes of 1887 the intention of the Legislature seems clearly to be to preserve this special right or privilege notwithstanding the rule, it is perhaps unnecessary to say whether I agree with the decision in *Legacy v. Pitcher*, 10 O. R. 620, which the plaintiff relies upon. With all respect, however, I cannot treat it as applicable to the construction of the statute and rules as they now stand.

On the short ground then that as to the replevin there is a local limit of jurisdiction to the county of Northumberland, and as to the other cause of action that the Justices Protection Act confers upon the defendant a special right or privilege of having it tried in that county, being the county in which the act complained of was committed, and in which he resides, and that neither of these are primarily questions of venue within the meaning of the rules, I am of opinion that the appeal should be allowed.

I refer to *Whitaker v. Forbes*, L. R. 10 C. P. 583; 1 C. P. D. 51, and to *Companhia de Mocambique v. British South Africa Co.* (1892), 2 Q. B. 358, in which the effect of the rule abolishing local venue in giving the High Court jurisdiction to entertain an action for damages for trespass to land in a foreign country was very fully considered.

Judgment. MACLENNAN, J. A. :—

MACLENNAN,
J.A.

The question of jurisdiction by reason of the action having been brought and tried in a wrong county, seems to have been contested by the defendant at every stage, and to have been decided against him, and the objection was renewed before us. The reasons on which the learned Judge refused to give effect to it are not stated in his judgment; but the point seems so clear that I think it sufficient for the decision of the appeal.

The fourth section of the Replevin Act, R. S. O. ch. 55, repeats the provision in relation to such actions which had been on the statute book for a long time, that in case the value of goods distrained does not exceed the sum of \$200, and the title to land is not brought in question, the action may be brought in the county court of the county wherein the goods have been distrained. This is the only enactment which gives jurisdiction in replevin to county courts, and therefore, although the word "may" is used, no other county court than the one named can be resorted to: R. S. O. ch. 47, sec. 19 (5).

It was argued however that Consolidated Rule 653 had, in conjunction with the Act 51 Vic. ch. 2, sec. 4, and Consolidated Rule 1257, virtually repealed section 4 of the Replevin Act, and that an action of replevin might be brought, subject to the order of a judge, in any county court whatever. In support of this contention *Legacy v. Pitcher*, 10 O. R. 620 was cited, and that decision undoubtedly covers the point, although decided with reference to a different statute, namely R. S. O. ch. 73.

That case however was decided in 1886, and since then the section in question has been re-enacted in the revise of 1887, and must therefore be taken either not to have been repealed by the Judicature Act, or if it was, to have been again enacted by the Legislature. In *Arcott v. Lilley*, 14 A. R. 283, decided in May, 1887, a very closely analogous question arose, and it was decided that the Judicature Act had not repealed the Act then under discussion, and the re-

enactment of it in the Revised Statutes was held to be conclusive.

Judgment.
MACLENNAN,
J.A.

I think it clear, therefore, that this action of replevin was wrongly brought in the County Court of the county of Hastings instead of in the County Court of Northumberland, and so far as that part of the action is concerned, the appeal ought to be allowed.

As to the other part of the action, the same conclusion must be come to, although it depends on a different statute, namely, R. S. O. ch. 73, secs. 1 and 15. It was pleaded and proved, and was not disputed, that the defendant did the acts complained of in the execution of his duty as the collector of taxes for the township of Brighton, under the provisions of the Municipal Act of Ontario. He was therefore clearly entitled to the benefit of both section 1 and section 15 of the Act, for his protection as to the other parts of the plaintiff's claim. Section 15 is imperative that an action for such a matter shall be tried in the county where the act complained of was committed, and when brought in a county court, shall be brought in the county where the act was committed, or in which the defendant resides. The acts complained of were committed, and the defendant resided, in Northumberland, and therefore the County Court of Hastings had no jurisdiction to try the other matters any more than the replevin.

The appeal therefore, in my opinion, ought to be allowed as to all the matters complained of, and the action must be dismissed with costs.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Appeal allowed with costs.

CORRIDAN V. WILKINSON.

Defamation—Slander—Privilege—Malice—Justification—Evidence—Pleading.

Pleading justification in an action of slander, where no attempt is made to prove the plea, is not in itself evidence of malice entitling the plaintiff to have the case submitted to the jury, the words in question having been spoken on a privileged occasion.
Judgment of the Common Pleas Division affirmed.

Statement. THIS was an appeal by the plaintiff, and a cross-appeal by the defendant, from the judgment of the Common Pleas Division.

The plaintiff was a milliner who had been in the defendant's employment, and brought an action against him to recover damages for alleged slander and for wrongful dismissal, and also to recover wages alleged to have been due to her at the time of her dismissal.

The action was tried at Milton, on the 27th of April, 1891, before STREET, J., and a jury, when a verdict was found in favour of the plaintiff for \$200 damages for the slander, and \$142.35 for wages, the claim as to the wrongful dismissal being dismissed.

Upon motion by the defendant to the Divisional Court the finding of the jury in respect of the slander was set aside on the ground that the occasion upon which the words in question were spoken was a privileged one, and that there was no evidence of malice to submit to them. The finding as to wages was upheld.

The appeal and cross-appeal were argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 14th of November, 1892.

Laidlaw, Q. C., and *Kappele*, for the appellant, contended that as the defendant had pleaded justification, that was in itself sufficient to entitle the plaintiff to have the slander count submitted to the jury. [Other points, depending on the facts, were argued, but it is unnecessary to set them out.]

W. Cassels, Q. C., for the respondent.

January 17th, 1893, the judgment of the Court was delivered by

Judgment.

OSLER,
J.A.

OSLER, J. A. :—

[The learned Judge set out the facts and discussed the evidence, and held that the occasion upon which the words in question were spoken was a privileged one, and that there was no evidence of malice in connection with the speaking of the words, and then proceeded as follows:]

The only other circumstance the plaintiff relied upon was that the defendant had pleaded a justification of the alleged slander, and that this was of itself some evidence of malice. As to this I think it might be enough to say that the plaintiff's counsel did not at the trial put it forward as evidence of malice, nor was it referred to by the learned Judge in his charge, or left to the jury as being such. There was no attempt made to prove the plea, and the Court below appear to me to have rightly held that so far as the facts were brought out they were so only with reference to the claim for wrongful dismissal, and for the purpose of shewing that the occasion was privileged. I think, however, that there is nothing in the point. I have not been able to find any clear decision that in an action of this kind the mere pleading the plea or defence of justification is evidence of malice for the purpose of taking away the privilege. In *Caulfield v. Whitworth*, 16 W. R. 936; 18 L. T. N. S. 527, Willes, J., said: "The rule is clear that where there are more issues than one the pleading on one of them cannot be used as evidence to establish the opponent's case on another. It would be astounding if the plea of justification were sufficient of itself to establish the allegations in the declaration."

Simpson v. Robinson, 12 Q. B. 511, was a very different case from the present. There the plaintiff had expressed his willingness in Court to accept an apology with nominal damages if the defendant would not persist in a justification of the truth that he had pleaded: this the defendant

Judgment.

OSLER,
J.A.

refused, and though he offered no evidence in support of the justification, he never withdrew the charge. There the trial Judge told the jury that on the question of malice the whole of the defendant's conduct might be considered by them, alluding apparently to his conduct in refusing to abandon the plea, and then not attempting to support it. This case and others decided on the same subject are unfavourably commented on by Willes, J., in the case above cited. *Wilson v. Robinson*, 7 Q. B. 68, is also an express authority that in an action of libel the jury cannot infer express malice from the fact of a justification being placed upon the record and abandoned.

It is altogether another question whether when the defence of privilege has failed it may not be looked upon as some evidence of malice in aggravation of damages: *Wilson v. Robinson*, 7 Q. B. 68; *Warwick v. Foulkes*, 12 M. & W. 507; *Brook v. Avrillon*, 21 W. R. 594.

The plaintiff's appeal must therefore be dismissed.

Appeal dismissed with costs.

McGEACHIE V. NORTH AMERICAN LIFE ASSURANCE COMPANY.

Insurance—Life insurance—Note given for premium—Nonpayment—Forfeiture—Election—Waiver.

Under a policy of life insurance with a condition that if any note given for a premium should not be paid at maturity the policy should be void, but the note should nevertheless be payable, the insurers are not bound on nonpayment of the note to do any act to determine the risk. In the absence of an election to continue the risk it comes to an end and mere demands for payment of the note and a refusal during the currency of the note to accede to the insured's request for cancellation of the policy are not sufficient evidence of such election.

Judgment of the Queen's Bench Division, 22 O. R. 151, reversed, and that of STREET, J., at the trial, restored.

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 22 O. R. 151. Statement.

The plaintiff was the widow of one Robert McGeachie, whose life the defendants had insured in her favour for \$1,000, by a policy dated the 6th of December, 1889, and she sued for the amount of the policy. The policy was issued in consideration of a premium of \$31.10 for which McGeachie gave his note, which was three times renewed, interest being charged and compounded at each renewal, and the third renewal matured on the 16th of October, 1890, and was unpaid at the time of the death of McGeachie on the 6th of November, 1890. The defence was that by reason of the nonpayment of the premium note the policy had become void under a condition to that effect therein contained, and the plaintiff contended as against this that the company had elected to keep the policy in force notwithstanding the nonpayment of the note. The policy in question and the correspondence relating to the matter are set out in full in the report of the case in the Court below.

The action was tried at St. Catharines on the 5th of May, 1891, before STREET, J., who dismissed it, but his judgment was reversed by the Queen's Bench Division.

Argument. The defendants appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER and MACLENNAN, JJ.A., on the 1st and 2nd of December, 1892.

J. K. Kerr, Q. C., for the appellants. The Court below were wrong in holding that some act was necessary to effect a forfeiture of the policy. The policy by its terms became void upon nonpayment of the premium and forfeiture then took place. The payment is clearly a condition precedent and the note was not accepted as payment but merely as evidence of the period of credit. Apart from the question of election or waiver the policy was clearly at an end; first, because payment upon a fixed date is of the essence of a contract of life insurance; and second, because the contract in terms so provides and further provides the only mode in which the contract can be restored: *Neill v. Union Mutual Insurance Co.*, 7 A. R. 171; *Klein v. Insurance Co.*, 104 U. S. 88; Article, 11 Am. L. Rev. 221. Upon nonpayment of the note the forfeiture *ipso facto* took place: *Knickerbocker Life Insurance Co. v. Pendleton*, 112 U. S. 696; *Wall v. Home Insurance Co.*, 36 N. Y. 157; *Pitt v. Berkshire Life Insurance Co.*, 100 Mass. 500; *Bigelow v. State Mutual Life Assurance Association*, 123 Mass. 113. It is a fallacy to speak of what took place here as being a waiver of the forfeiture. It is possible that after the forfeiture has taken place a new contract or a renewal of the old contract may take place, but that is different from a mere question of waiver and before such a new contract can be given effect to there must be clear evidence that the company have entered into it. There must be just as strong evidence as if it were attempted to make out a contract irrespective of any previous dealings between the parties and there is certainly no evidence going to that length in the present instance. At most there are merely some demands for payment of the premium. The company had carried the insurance for some months and were entitled not only under the very terms of the policy but also

as a matter of implied contract to payment of the premium, notwithstanding that the insurance had come to an end : May on Insurance, 3rd ed., sections 341, 342 ; *Venner v. Sun Life Insurance Co.*, 17 S. C. R. 394. Argument.

Aylesworth, Q. C., and *Marquis*, for the respondent. The note in question was taken in actual payment of the premium, and upon the acceptance of that note the insurance was in force for one year at least. The nonpayment of the note did not really affect the matter but was merely a question of debt as between the company and the maker of the note. The policy requires payment in advance before delivery and the fact that the company delivered the policy to the assured is clear evidence that they themselves looked upon the giving of the note as equivalent to payment of the premium. Then, too, the fact that interest was charged on each renewal emphasizes this position : *Massé v. Hocheluga Mutual Insurance Co.*, 22 L. C. Jur. 124 ; *Goit v. National Protection Insurance Co.*, 25 Barb. 189 ; *Sansum's Digest of the Law of Insurance*, Cols. 900 to 903. If, however, the note is not to be treated as actual payment, still the policy did not become absolutely void, but was only voidable, and the company did no act whatever to forfeit it, but on the contrary always recognized it as being in force and kept demanding from the assured payment of his premium with the added threat that if payment were not made the policy would be forfeited. Not having, however, actually forfeited the policy before the death of the assured it could not after that time be forfeited and the unpaid note is a mere matter of set-off : *Miller v. Life Insurance Co.*, 12 Wall. 285 ; *Wing v. Harvey*, 5 D. M. & G. 265 ; *McCrea v. Waterloo County Mutual Fire Insurance Co.*, 1 A. R. 218 ; *McIntyre v. East Williams Mutual Fire Insurance Co.*, 18 O. R. 79. The policy, too, allows a month's grace for payment of premiums, and the note was not a month overdue when the assured died.

J. K. Kerr, Q. C., in reply.

Judgment. January 17th, 1893. HAGARTY, C. J. O.:—

HAGARTY,
C.J.O.

I feel very great difficulty in accepting the view of the Divisional Court that when the life dropped there was an existing contract of assurance with the defendant company.

Conceding for the argument that so long as they continued accepting promissory notes instead of cash for premiums, and so long as any one of such notes was current when the life dropped, the insurance was in force, I cannot see how this judgment can be upheld.

Down to the 16th of October, the time of the last renewal, we may treat the contract as existing. The dishonour of that last note left nothing remaining. The company could at once have cancelled the risk, leaving still a liability on the assured to pay the notes on the terms of the policy.

I do not think the company were bound expressly to notify the assured that they elected to do this. It became incumbent on the plaintiff to establish with reasonable clearness some act of the company to revive the lost liability.

The case then wholly depends on their action in writing the letter of November 5.

"We fully expected to have heard from you ere this with a remittance for your note, which matured on the 16th ult. Kindly give the matter your immediate attention."

This letter never reached the hands of the person to whom it was addressed, he having died on the morning after it was written.

Now, apart from the argument that the letter may be read as merely pressing for payment of the note, even if the risk had been cancelled, the difficulty remains that nothing whatever was done upon it.

If the assured had acted on and paid the note and the defendants had accepted the payment, I do not doubt but that the plaintiff could recover on a finding that such payment was made and accepted as completion of payment of the year's premium and not merely to pay the note on a cancelled risk.

But nothing was done, the dropping of the life was the only answer.

Judgment.
HAGARTY,
C.J.O.

I should be of the same opinion even if the letter had gone much further and had specially referred to the insurance and had urged on McGeachie to pay up and thus save the insurance, the saving could only be by paying up.

If the manager had met him on the 5th of November and asked him why he did not attend to the matter and pay up the overdue note, and the other promised to do so next day, and died, say from an accident, two hours afterwards, what would be the position? If he paid he saved his insurance, if he did not but died without paying, I think, with submission, that the contract is at an end. Or if when this letter was written McGeachie was actually dead without the writer's knowledge, would it amount to the creation of a new contract?

The dishonour of a note given for the premium makes the insurance null and void.

Of course the company may waive the forfeiture, and so long as they continue renewing or accepting paper the contract may continue.

But the utmost evidence of waiver here amounts at most, even if the letter had reached its address, to a suggestion to do something which might if done preserve the contract.

Nothing was done and I cannot believe that the law we are bound to administer can warrant a recovery.

I do not consider that the one month's grace allowed on payment of premium can affect this question.

The whole seems based on the necessity of the first year's payment in advance being made to validate the policy. The parties agree to take paper for this and to renew such paper more than once. The month's grace can hardly apply to each note so given.

I am aware of the great latitude allowed by some of the numerous American authorities in the dealings between assurers and insured.

In a much contested case of *Moffatt v. Reliance Mutual*

Judgment. *Assurance Society*, 45 U. C. R. 561, I had occasion to examine these authorities and then expressed an opinion that they seemed to me to go far beyond the limits of English law. I still retain that opinion.

HAGARTY,
C.J.O.

I think my learned brother Street's judgment should be restored and the appeal allowed.

BURTON, J. A.:—

I quite agree with the Court below that upon the giving of the note and the issuing of the policy the risk attached, and that the policy was voidable only at the election of the company; but I am unable to adopt the reasoning that under the facts of this case there was any waiver of the forfeiture, or any act done by the company from which the assured had the right to infer that they considered the policy still in force, unless we come to the conclusion that such an agreement as that adopted by this company, conferring the right to enforce payment of the note notwithstanding the lapse of the policy, is invalid. I do not think the argument is advanced by shewing that the company were demanding payment of the note or even suing upon it. They might do one or the other without any intention of reviving the policy consistently with the terms of such an agreement. I think it very probable that if the demand had been responded to by payment during the life of the assured, the company would have waived the forfeiture, but they were under no legal or equitable obligation to do so.

I am free to confess that such an agreement as that in question to my mind seems somewhat inequitable, inasmuch as the company might thereby be receiving a full year's premium, whilst the assured had only been covered for six months; but people are at liberty to make their own contracts, and it is no part of our duty to make contracts for them, but merely to interpret those which they have made.

The arrangement whereby the assured elects to pay the

annual premiums in semi-annual or quarterly instalments appears to me to be much more equitable. The policy is then liable to forfeiture for nonpayment on the day appointed for payment, but the assured loses only the proportion of the premium during which he has been assured.

Judgment.

BURTON,
J. A.

The case of *Olmstead v. Farmers' Mutual Fire Insurance Co.*, 50 Mich. 200, referred to in the judgment below, is, I think, very distinguishable. In that case there was no provision that nonpayment should work a forfeiture, but that the secretary might in a certain event suspend or cancel the policy subject to an appeal. It was a fire policy, and so far from the policy having been cancelled up to the occurrence of the fire, the secretary had just previously notified the insured that his insurance was liable to suspension, *unless prompt attention were given to the notice*.

No act was necessary in this case on the part of the company to show that they had elected to avail themselves of the forfeiture—that was provided for in the conditions—and the letter relied on is in no way inconsistent with their having so elected. It would have been very different had they advised the assured that unless the payment was at once made the policy would be avoided.

I am of opinion therefore that the judgment of Mr. Justice Street was correct and should be restored.

OSLER, J. A. :—

The judgment of Street, J., dismissing the action, ought in my opinion to be restored. I think the nonpayment of the last renewal note for the balance of the first premium raised a clear defence under the provision in the application and policy, that if any premium note, cheque, or other obligation given on account of a premium be not paid at maturity, the policy shall be void and all payments made upon it forfeited to the company. Conceding that this means void at the option of the insurers they were not obliged to do anything shewing an election to avoid it in the life time of the insured. If

Judgment.**OSLER,
J.A.**

the premium remained unpaid at the time of his death the policy is void if they set up the condition. The policy has simply come to an end: *Roehner v. Knickerbocker Life Insurance Co.*, 63 N. Y, 160; *Robert v. New England Mutual Life Insurance Co.*, 1 Disney (Ohio) 355; *Lantz v. Vermont Life Insurance Co.*, 139 Pa. St. 546, at p. 561. If before death they had accepted payment of the premium the case might have been within *Wing v. Harvey*, 5 D. M. & G. 265, and *Armstrong v. Turquand*, 9 Ir. C. L. 32 (1858), and the defendants might have been held liable or at the most it would have been a question upon the evidence whether they had accepted payment on the footing of the policy being in force, or under the stipulation that the premium note should be payable at all events and notwithstanding its avoidance. Here there is nothing but the fact of default in payment of the obligation given for the premium, and a call for its payment, which never came to the knowledge of the insured. His representatives could be in no better position than they would have been in if it had come to his knowledge, and he had died without complying with it, and I do not see how, consistently with giving any force or effect whatever to the conditions of the contract, the demand can be regarded as more than an intimation to the insured or a declaration by the defendants that if the premium was paid during his lifetime the defendants were willing to treat the policy as being still on foot. No inference can justly be drawn from it that they were treating it as unaffected by the default and that the premium, *quâ* premium, was paid by the note, in other words that they were electing to keep the policy on foot, except on the terms of payment being made in the lifetime of the insured. In point of fact, however, the defendants' letter of the 5th of November, 1890, never did come to the knowledge of the insured, as he died before it could be delivered, so that if there was an intention on the defendants' part to elect not to avoid the policy, that intention was not communicated to him, the election never was completed, and the case is simply one of the insured

dying while in default and thus coming within the terms of the destructive condition. I refer to *Neill v. Union Mutual Life Insurance Co.*, 45 U. C. R. 593, 7 A. R. 171; *Doe Nash v. Birch*, 1 M. & W. 402, at p. 408; *Croft v. Lumley*, 6 H. L. C. 672, at p. 705.

Judgment.

OSLER,
J.A.

I do not wish to be understood as saying that a demand, even if actually communicated to the insured, unless followed by actual payment and acceptance of the premium in his lifetime, would be evidence of a waiver of the forfeiture or sufficient to reinstate the policy.

In *Edge v. Duke*, 18 L. J. Ch. 183, where the company had not only demanded payment of the overdue premium, but had sued for it, they were held entitled to insist upon the forfeiture notwithstanding.

For these reasons I concur in allowing the appeal.

MACLENNAN, J.A.:—

I also am of opinion that the appeal should be allowed.

During the argument I thought the circumstance that when the first note given for the premium was renewed it was given up to the maker, might make a difference. The first note was undoubtedly "given on account of a premium" within the condition endorsed upon the policy, but before it became due it was given up and another note was taken in lieu of it, and this process of renewal was repeated once or twice. It cannot be said that the original note under these circumstances was a note "not paid when due" within the meaning of the condition, and having been given up, if it was a paid note, it could never become anything else, or be revived by the dishonour of the renewal. Then the second and subsequent notes were not given on account of a premium, as the first was, but in payment of the antecedent ones, or at least in lieu of them. Upon reflection, however, I think it would be putting too narrow a construction upon the language of the condition to hold that the subsequent notes were not also given on account of a premium. We cannot truthfully, making

HAGER V. O'NEIL ET AL.

Illegality—Consideration—Mortgage—Foreclosure.

The rule of law which holds contracts made upon immoral consideration to be invalid is confined to executory agreements, and therefore to an action for foreclosure of a mortgage given to secure part of the purchase money of a house it is no defence to shew that the house has been purchased, to the vendor's knowledge, for use as a house of ill-fame. The plaintiff being able to make out the right to relief by production of the mortgage without disclosing the illegal transaction the defendant cannot set up the illegality as a defence.

Judgment of STREET, J., 21 O. R. 27, affirmed.

Statement.

THIS was an appeal by the defendant Clark from the judgment of the Chancery Division, affirming, by a division of opinion, that of STREET, J., reported 21 O. R. 27.

The plaintiff had for some years carried on a house of ill-fame on certain premises owned by her, and in 1886 she leased the house to the defendant O'Neil, an inmate. For a year and a half O'Neil carried on the same business to the knowledge of the plaintiff, and in 1888 purchased for \$5,000 the freehold from her, taking an absolute conveyance, and giving back a mortgage for \$4,500, payable in quarterly instalments of \$125. In 1890 O'Neil sold to the defendant Clark for \$6,900, subject to the mortgage to the plaintiff which Clark covenanted to pay off. Default having been made in payment the plaintiff brought this action against O'Neil and Clark, asking payment or foreclosure, and delivery of possession.

The defendants pleaded in general terms that the consideration for the mortgage was illegal and immoral, and that the mortgage was therefore void.

The action came on for trial at Toronto on the 8th of October, 1890, before ARMOUR, C. J., who refused an application by the defendants for a postponement, and on their counsel thereupon withdrawing, gave judgment for the relief claimed. On motion to the Divisional Court it was contended that of the \$5,000, the price of the property, \$2,000 was given because of its reputation as a house of ill-fame; and the Divisional Court granted a new trial upon pay-

ment of principal, interest and costs, less \$2,000, the order being made without prejudice to the right of the defendants to raise all defences as to this balance. These terms were complied with, and the action as to this balance came on again for trial on the 17th of April, 1891, before STREET, J., who subsequently gave judgment in favour of the plaintiff, and this judgment was affirmed by the Chancery Division (FERGUSON and MEREDITH, JJ.), on the 5th of September, 1891, the following judgments being delivered :—

Statement.

FERGUSON, J.:—

The action is upon a mortgage on certain lands in the city of Toronto, made by the defendant Jennie O'Neil to the plaintiff, to secure the payment of the sum of \$4,500, part of purchase money of the same lands which were sold by the plaintiff to this defendant.

The defendant Clark purchased the lands from the defendant O'Neil for \$6,900, as appears by the conveyance. This purchase is expressly subject to the mortgage, on which there was, as stated in the conveyance, then due and owing the sum of \$3,700 and interest, and in the same conveyance the defendant Clark covenanted with the defendant O'Neil to pay off and discharge this mortgage and to indemnify and save harmless her, the defendant O'Neil, in respect of the same.

The plaintiff claims foreclosure, an order for payment of \$3,709.58, an order for the delivery of possession to her, the plaintiff, and general relief.

The action seems to be in form the usual mortgage action in cases where the equity of redemption has been assigned. The defendants in their statement of defence, after denying the allegations in the statement of claim, say that the consideration for the execution of the mortgage was illegal and immoral, and that the mortgage is, therefore, void and of no effect, and that public policy requires that the Court refuse its aid to the plaintiff in the

Judgment. attempt to enforce the mortgage, and to thereby ratify the
FERGUSON, J. immoral transaction.

By way of reply, the plaintiff, after joining issue upon the statement of defence, says that if it should be found by the Court that the consideration for the execution of the mortgage was illegal or immoral, the defendants are parties thereto and have notice of such consideration and are therefore not entitled to any benefit under or by virtue of the mortgage and cannot set up the illegality of the consideration as a defence.

The action was tried before my brother Street, who held that the contract was not an immoral one (upon the authorities), and that if it were the plaintiff would, nevertheless, be entitled to recover possession by reason of the legal estate remaining in her.

The judgment was for possession, and the usual foreclosure judgment. By consent, however, the action was dismissed as against the defendant O'Neil.

As stated at the bar, a motion had been made to the Court, and some proceedings had, in which satisfaction had been made as to the plaintiff's claim except the sum of \$2,000, and the defendants are now contesting the plaintiff's claim as to this sum only. The learned Judge has found, and the facts now seem to be undisputed, that the plaintiff, before her sale to the defendant O'Neil, had carried on a house of ill-fame upon the premises in question; that she then leased the premises to this defendant O'Neil, who carried on the same business for a year and a half, at the end of which time she purchased the property from the plaintiff and gave the mortgage in question as part of the consideration.

So far there seems to be no doubt or dispute as to the facts.

The learned Judge also finds that when the defendant O'Neil purchased she intended to carry on the same unlawful business which she had theretofore carried on upon the premises, and that the plaintiff then supposed she would do so.

I do not understand that this finding is objected to, and Judgment. I think that it is clearly supported by the evidence. The FERGUSON, J. trial Judge adds that he is satisfied that the property could readily have been sold for the same sum (\$5,000) to other persons at the time; that its market value was at least this sum, and that the character of the house formed no element in the consideration paid for it.

This finding is disputed or questioned, counsel for the defence contending, as he did at the trial, that \$2,000 of the purchase money was given for the goodwill of the place, as a house of ill-fame.

I have perused the evidence given as to the actual value of the property at the time of the sale by Hager to O'Neil. The figures of the witnesses are, as is usual in such cases, widely different, but one has to do the best he can with them. The witnesses, O'Neil, Galley, and Sinclair, and the assessments given, are from \$2,500 to \$3,000, whilst Hager says \$5,000, Sherrin \$5,000 at least, and he speaks of \$7,500; Nesbitt \$5,000, and he could have sold to ten people at the time this sale was made for this sum; says it could have been sold then for \$6,000. Boyle says \$6,250. Clark, at the time he purchased, agreed to pay \$6,900, but he said he was afflicted at the time with what, from his evidence, might be called a "Court House boom fever" (the land being in the neighbourhood of the new Court House site) and more or less influenced by reason of another purchase he had made of land adjoining or close by this land.

There is ample evidence to support the finding of the learned Judge as to the value of the property at the time of the sale by Hager to O'Neil, and this finding cannot, I think, be disturbed.

The statements of the defendant O'Neil, regarding the sale of the goodwill of the place for this infamous business by Hager to her, is flatly contradicted by Hager. Only the two seem to have knowledge on the immediate subject. The conversations stated by O'Neil as to what might be made in the house and the encouragement she got from

Judgment. Hager to make the purchase, are uncorroborated and plainly discredited by the Judge, and he says he thinks what O'Neil says respecting the bargain for the goodwill was the result of an "after thought," and after a careful perusal of the evidence I think the learned Judge is in this quite right. In such a case as this it is difficult not to entertain a suspicion or an opinion that the vendor had knowledge of the purposes for which the purchaser intended to use the property. I am, nevertheless, of the opinion that the learned Judge is right upon the evidence when he says (leaving the evidence that he discarded out of the case) that there is nothing shown more than knowledge on the plaintiff's part of the use to which the house had been put prior to the sale, and a belief that such use would in all probability be continued, but nothing done in furtherance of that use beyond the mere fact of the sale; no consent to or participation in the subsequent user, and nothing to induce the belief that the purpose of the sale was other than that of turning \$5,000 worth of land into that sum of money.

I am free to say that at and after the argument I had an opinion somewhat different, but after a most careful perusal of the whole of the evidence I think it quite plain that in this respect the learned Judge is correct, and that the case must be considered on this footing.

It may be considered noticeable that when the defendant Clark is asked what objection he had to pay the mortgage as he had assented and covenanted to do, he answers he paid a great deal too much for the property and that the defendant O'Neil when asked a similar question in her examination before the trial, makes a somewhat similar, if not an exactly similar, answer; but at the trial she said her reason for declining to pay, or thinking that payment should not be made, was that the contract was illegal, and this she repeated several times.

The conduct or intentions, or the reasons, or views, of the defendants in regard to this subject are, as it seems to me, of little if any importance, because when relief is

given against a contract on the ground that public interest ^{Judgment.} requires that it should be given, it is not really given to FERGUSON, J. the party, but to the public through the party. (See Story's Equity, 13th ed., at p. 298). This proposition is expressed by many authors and judges in different words, and by some in very full and elegant language. The above statement of Mr. Justice Story seems to me, however, to comprehend all that is meant.

A very large number of cases and authorities were referred to by counsel on the argument before us. These I have perused, with the exception of one or two that I did not find, and I have arrived at the conclusion that when it is assumed that the findings of the learned Judge are right, as I think they are, the plaintiff's action upon the mortgage must succeed. And it seems to me not necessary that I should here refer to many of the large number of cases cited.

In *Hodgson v. Temple*, 5 Taunt. 181, it was held that merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment, but to effect that it is necessary that the vendor should be a sharer in the illegal transaction. This decision seems to be in much the same line as *Bowry v. Bennet*, 1 Camp. 348, tried before Lord Ellenborough. The case *Langton v. Hughes*, 1 M. & S. 593, had, it seems, been decided before *Hodgson v. Temple*, but is not referred to in it. In *Langton v. Hughes*, it was decided, and distinctly asserted as the true principle, that parties who seek to enforce a contract for the sale of articles, which in themselves are perfectly innocent, but which were sold with the knowledge that they were to be used for a purpose prohibited by law, are not entitled to recover. That was a case of selling drugs to brewers for the purpose of being mixed with beer, contrary to the provisions of a statute, and the ruling which was held by the Court to be correct was that the plaintiff in selling the drugs to the defendant, knowing that they were to be used contrary to the statute, was

Judgment. aiding the defendant in the breach of the Act, and therefore not entitled to recovery. It was an undisputed fact in the case that the plaintiffs knew that the defendants intended to use the drugs for mixing with the beer contrary to the statute.

After this the case *Cannan v. Bryce*, 3 B. & Ald. 179, was decided. The question was whether money lent for the purpose of enabling a party to pay for losses and compounding differences on illegal stock transactions could be recovered. The Court said that it was impossible to say that making such payments is not an unlawful act, and that if it were unlawful in one man to pay, how could it be lawful in another to furnish him with the means of payment. The learned Chief Justice who delivered the judgment of the Court said: "It will be recollected that I am speaking of a case wherein the means were furnished with the full knowledge of the objects to which they were to be applied, and for the express purpose of accomplishing that object."

In *Cannan v. Bryce*, the previous cases are to a large extent reviewed, many of them virtually overruled, and *Langton v. Hughes*, approved and followed.

In *McKinnell v. Robinson*, 3 M. & W. 434, *Cannan v. Bryce* is referred to as a decisive authority on the subject. In the later and well known case of *Pearce v. Brooks*, L. R. 1 Exch. 213, the jury found that the defendant did hire the brougham for the purpose of her prostitution, and that the plaintiff knew it was supplied for the purpose. It was held that it was not necessary to shew that the plaintiff expected to be paid from the proceeds of immoral acts, that the jury were justified in drawing the inference they did draw in respect of the plaintiff's knowledge of the purpose of the hiring, and that the plaintiff's knowledge that the brougham was supplied for the purpose of the defendant's prostitution was sufficient to render the contract void on the authority of *Cannan v. Bryce*, which the Court recognized as a leading case on the subject. In the case *Pearce v. Brooks*, however, Martin, B., said at p. 219: "As to the

case *Cannan v. Bryce*, I have a strong impression that it ^{Judgment} has been questioned to this extent, that if money is lent, ~~FERGUSON, J.~~ the lender merely handing it over into the absolute control of the borrower, although he may have reason to suppose that it will be employed illegally, he will not be disentitled from recovering. But, no doubt, if it were part of the contract that the money should be so applied, the contract would be illegal."

Looking at what was said by Abbott, C. J., in *Cannan v. Bryce*, before referred to, namely, that he was speaking of cases in which the means were furnished with full knowledge of the object, and for the express purpose of accomplishing that object, one scarcely sees the necessity for the remark of Martin, B., above. It is, however, referred to in the later case, *Bagot v. Arnott*, Ir. R. 2 C. L. 1, at p. 6, by Keogh, J.

In *Taylor v. Chester*, L. R. 4 Q. B. 309, the consideration was wine supplied to be consumed in a debauch to be held in a brothel, and to secure payment for this the note was deposited, and the plaintiff was held not entitled to recover because he was himself a party to the contract. He must have both known and intended the purpose. The Court said the illegality was the direct result of the transaction upon which the deposit of the note sued for took place, and not a collateral matter as in *Feret v. Hill*, 15 C. B. 207.

The case *Smith v. Benton*, 20 O. R. 344 (so far as it may be considered to have any possible bearing here), was an action to recover the price of liquor sold to be vended or retailed contrary to law. The learned Chancellor drew the inference as a jury might do, from the circumstances, that the plaintiff had knowledge of the illegal purpose, and was implicated as a contributor of the transgression of the law. The learned Judge in the present case has not drawn any such inference against the plaintiff. His finding, which I have said, and I think, is correct, is the contrary of it. If the cases were otherwise alike, this would of course clearly distinguish them.

In the Irish case *Bagot v. Arnott*, above mentioned, where

Judgment
FERGUSON, J. the security had been taken for an advance of money with knowledge that the person to whom it was advanced had committed felony and was about leaving the country, and would use a portion of it for that purpose, the security was held to be good. The case was distinguished from *Pearce v. Brooks*. Reference is made to the remark of Baron Martin as to the case *Cannan v. Bryce*, before alluded to, and the rule laid down by Baron Bramwell, drawn from the same case, *Cannan v. Bryce*, referred to, where he says: "The principle is that the repayment of money lent for the express purpose of effecting an illegal object cannot be enforced."

Taking the present case, the plaintiff sold real property for no more than the actual value of it, and according to some of the evidence it could at the time have been sold for a much larger price. The finding, as before stated, is that there was nothing more than knowledge on the plaintiff's part of what use the property had been put to before the sale and a belief that such use would probably be continued. But nothing done in furtherance of the use beyond the mere fact of the sale, and nothing to induce the belief that the purpose of the sale was other than that of turning \$5,000 worth of land into that sum of money.

Taking this to be the true state of the facts, as after what I have said, I must, I am wholly unable to see that the case falls under any of the authorities which determine that transactions are void by reason of illegality; and I am of the opinion that the plaintiff's mortgage is, notwithstanding all that has been urged against it, a good and valid mortgage, upon which she is entitled to all the usual remedies in a mortgage action, that is, all the remedies that are usual and for which she has asked or prayed.

I do not think it necessary that I shall consider the case dealt with by the learned Judge that would arise if the transaction were tainted with illegality, that is the plaintiff's right, nevertheless, to the possession of the property spoken of in the judgment.

The judgment should, I think, be affirmed with costs.

(During the argument I referred to *Bowry v. Bennet*, Judgment, 1 Camp. 348; and *Lloyd v. Johnson*, 1 B. & P. 340; and *Ferguson, J. Crisp v. Churchill*, there cited).

MEREDITH, J. :—

Reluctant as one must naturally, and may very properly, be to give effect to the defence set up in this action, especially in favour of the defendant Clark, to enable him to escape payment of a large portion of the price which he agreed to pay for the property, in the face of his covenant with his co-defendant, contained in the deed of the property from her to him—which transaction is in no way tainted with the alleged illegality—to pay off and discharge the mortgage in question, the full amount of which is therein stated to be due and owing, that cannot be avoided, if, according to law, the defence be a valid one, and if it has been proven; and it is but fair to this defendant to say, that he, through his counsel, Mr. Holmes, upon this as well as upon a former argument of the case, very earnestly asserted that if successful in it, his co-defendant, to a large if not to the whole extent, is to have the benefit of this defence.

With every such reluctance, and with great distrust of my own judgment in view of the contrary opinions already expressed, I am obliged to say that I am quite unable to agree with the trial Judge in the judgment pronounced by him, or to concur, especially in regard to the facts, in the judgment just pronounced; indeed, but for them, I would have no hesitation in reaching and expressing the conclusion that the facts relied upon in the defence were mainly proven, and that as between the parties to the original transaction at all events, they constituted a valid defence to the action.

Looking at the character of the parties to the original contract, the infamous traffic in which they were and had been so long engaged, the terms under which one was tenant to the other, and all that the plaintiff must have known

Judgment. respecting the tenant's character and conduct, and the means by which she was enabled to pay the exorbitant—if used for honest purposes—rent, and her want of any other means of paying it, and the manner in which the mortgage money was made payable, the price paid by the plaintiff herself for the property, the purpose for which she bought it, and other circumstances that are not or cannot well be denied, no other conclusion can fairly be drawn than that the property was bought for the purpose of continuing in it the immoral and illegal traffic for which it was then rented, and had been so long, and then was, used.

It may be that the plaintiff desired to turn "so much land into so much money," but she did so, in my opinion, with a full knowledge that the purpose of the purchaser in buying it was, as in renting it it had been, to use it for illegal purposes, to continue it, as it was, a blot upon morality, a nuisance at common law, maintained in defiance of the Vagrant Act and other criminal laws; as well as that any payments of purchase money would in all probability be made out of the money acquired in such immoral and illegal use of the property.

It cannot have been that she expected to be paid out of the land itself, else why sell and make a conveyance of it. The plaintiff does not seem to be one who would deal so foolishly with her property, give the purchaser the benefit of any increase in value, and, if no increase, be obliged to get it back at the expense of a foreclosure action. She must have expected to have been paid as she was, from time to time, part of the purchase money; and by what means was the purchaser to obtain the money to pay? What means have been or can be, within the range of probability at the time, suggested other than what could be made in an immoral and illegal manner? See *Smith v. White*, L. R. 1 Eq. 626; *Jennings v. Throgmorton*, Ry. & Moo. 251, and *In re Vallance*, 26 Ch. D. 353.

So that there was a sale of the property with a full knowledge on the part of the vendor that the purchaser bought and intended to use it for an immoral and illegal

purpose—a purpose which was a crime under the common, Judgment.
as well as statute law.

MEREDITH, J.

And reaching these conclusions as to the facts, is not the law now very plain?

A seller knowing that the intention of the purchaser in buying is unlawful, that the property is bought for immoral or illegal use as here, cannot in the Courts recover the price of it.

No court will lend its aid to any party whose action is founded upon an immoral or illegal act.

Even though that may enable, as it does here, one party to obtain an unfair and dishonest advantage over another, the principle requires that the Court remain unmoved; it leaves the parties as it finds them, precisely as they have placed themselves: *ex turpi causâ non oritur actio*. A rule which often works hardship, and perhaps does not best prevent or discourage such transactions.

The giving of the security for the purchase money does not help the plaintiff, nor would it if it had not been part of the original agreement.

Mr. Smyth was unable to cite any authority for considering the plaintiff in better position by reason of the purchase by the defendant Clark and the covenant on his part to pay off this mortgage contained in the deed between the defendants. They do not seem to aid the plaintiff: see *Aldous v. Hicks*, 21 O. R. 95.

The plaintiff requires aid from the illegal transaction to establish her case. She is seeking the assistance of the Court, and the Court will not assist in an illegal transaction in any respect. We cannot justly sever the matter to avoid the law; the whole substance of the transaction was a sale of the property; and the action is really to recover the purchase money. The plaintiff could not recover on a promissory note given for it: can she upon the mortgage? She must rely on that transaction; it must be part of her case. If the defendants were seeking to enforce any part of it, their difficulties would be the same. This defence has been sufficiently pleaded; there

Judgment. cannot therefore be recovery upon the mortgage: see MEREDITH, J. *Haigh v. Kaye*, L. R. 7 Ch. 469, and *Day v. Day*, 17 A. R. 157.

And it is clear that upon the other branch of the case the plaintiff cannot succeed. The deed was fully executed, and possession given—an actual transfer of the property. Nothing remained to be done; no aid was required or asked from the Court to complete or enforce the transaction in that respect: *Ayerst v. Jenkins*, L. R. 16 Eq. 275; *In re Mapleback*, 4 Ch. D. 150, and *Taylor v. Chester*, L. R. 4 Q. B., at pp. 312 and 315.

The cases in our own courts go quite so far: *Smith v. Benton*, 20 O. R. 344; *Mundell v. Tinkis*, 6 O. R. 625; *Bonisteel v. Saylor*, 17 A. R. 505; *Langlois v. Baby*, 10 Gr. 358, and on rehearing 11 Gr. 21, and *Johnson v. Cline*, 16 O. R. 129.

The effect of the judgment in *Mundell v. Tinkis* seems harsh; that once the transfer is actually made the die is cast irrevocably; there is no room for repentance: discouraging to them who would retrace a false step before harm done by it, and contrary to the then current of judicial opinion; which, however, seems to be now changing: see *Kearley v. Thomson*, 24 Q. B. D. 742, and *Herman v. Jeuchner*, 15 Q. B. D. 561.

I would allow the motion, and dismiss the action as to the amount now in question, both without costs.

The defendant Clark appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 17th and 18th of November, 1892.

Shepley, Q. C., for the appellant. It is important to bear in mind, in considering this case, the principle referred to in *Holman v. Johnson*, 1 Cowp., at p. 343, that the decision must rest on grounds of public morality and public policy, though the refusal of relief may be against the justice of the special case. It is no answer, therefore, that to adopt the appellant's contention will in effect relieve him

from payment of \$2,000, which he has for good consideration agreed to pay. Now it is not necessary, it is submitted, to shew, as Street, J., has held, that the plaintiff has not only a knowledge of the immoral purpose, but has done something in furtherance of it, and has agreed to participate in the fruits of it. Knowledge and approval are enough : Pollock, 5th ed., p. 350 ; Leake, 3rd ed., p. 667 ; Benjamin, 4th ed., p. 493, whose statement of the law is directly approved in *Seymour v. London, etc., Ins. Co.*, 41 L. J. C. P. 193, at p. 198 ; *Langton v. Hughes*, 1 M. & S. 593 ; *Jennings v. Throgmorton*, Ry. & Moo. 251 ; *Fisher v. Bridges*, 3 E. & B. 642 ; *Pearce v. Brooks*, L. R. 1 Exch. 213 ; *McKinnell v. Robinson*, 3 M. & W. 434 ; *Taylor v. Chester*, L. R. 4 Q. B. 309 ; *Smith v. White*, L. R. 1 Eq. 626 ; *Sykes v. Beadon*, 11 Ch. D. 170 ; *Smith v. Benton*, 20 O. R. 344. That the plaintiff had full knowledge is admitted, and the mode of payment leads strongly to the inference that she really was looking to and depending on the continuance of the illegal traffic for the means of payment, and thus approved of and participated in the fruits of that illegal traffic. The question of value is of no importance. The vendor can no more recover a fair price than an exorbitant one. It is also wrong to say, as Street, J., holds, that the plaintiff can recover possession under her legal title, even if the consideration is tainted with illegality, so that no personal order can be made. Surely if the sale is illegal the security for the price is also illegal and void : *Fisher v. Bridges*, 3 E. & B. 642 ; *Geere v. Mare*, 2 H. & C. 339 ; *Collins v. Blantern*, 1 Sm. L. C., 9th ed., 398, at p. 423. It is not like the case put of recovery of possession after the expiration of a lease for immoral purposes, for there the illegal transaction is completely at an end, and *Wheeler v. Wheeler*, 5 Lansing 355, cited for this, is quite a different case. Recovery there was allowed because the illegal bargain had nothing to do with the transaction actually in question, but the taint being shewn the parties will be left to themselves : *Herman v. Jeuchner*, 15 Q. B. D.

Argument.

Argument. 561; *Kearley v. Thomson*, 24 Q. B. D. 742; *Jones v. Merionethshire, etc., Building Society*, (1892) 1 Ch. 173.

E. D. Armour, Q. C., for the respondent. The appellant has endeavoured to raise many points that are not really open to him. The only question that remains open under the first judgment of the Chancery Division is whether the \$2,000 in question was or was not paid for the goodwill of the business in question. That was the only question that was open on the second trial, and that point, on sufficient evidence, has been decided against the defendants. The validity of the sale has been recognized all through, and it is now too late to contend that it was in fact illegal. If, however, that point could be raised in view of what has taken place in this case there is nothing in the pleading to justify such a defence. It has frequently been pointed out that a defence of this kind must be so definitely pleaded as to enable the plaintiff to demur, and, as it is expressed, "the defendant must write himself down a rascal": *Day v. Day*, 17 A. R. 157; *Haigh v. Kaye*, L. R. 7 Ch. 469. Assuming, however, that the defendants are entitled to go into the whole matter, the plaintiff is still entitled to recover. It is the gist of a defence of this kind that the person attempting to recover knew of the immoral intention and took part in and trusted to the profits of the immoral use. Here there is not even satisfactory evidence of knowledge, much less any evidence of intention of participation. There is, it is true, the fact of knowledge of the defendants' position; but to hold that that is sufficient would make it impossible for anyone, even in the utmost good faith, to sell on credit to a person of the defendant's calling. The mere proof of knowledge is by no means the same as proof of the intention to further and participate in the illegal purpose: *In re Vallance*, 26 Ch. D. 353. Actual knowledge of and participation in the illegal purpose and a furtherance of the illegal purpose by the vendor must be shewn: *Bagot v. Arnott*, Ir. R. 2 C. L. 1 (1867); *Bowry v. Bennet*, 1 Camp. 348; *Pellecat v. Angell*, 2 C. M. & R. 311; *Waugh*

v. *Morris*, L. R. 8 Q. B. 202, at p. 208. If the plaintiff can make out the case without giving evidence of the illegal contract recovery is allowed: *Fivaz v. Nicholls*, 2 C. B. 501; *Simpson v. Bloss*, 7 Taunt. 246. In all the cases cited on behalf of the appellant it will be found that the illegal transaction had to be proved as part of the case for recovery. Here the plaintiff is entitled to succeed on the production of the mortgage. It is the defendant who is setting up the illegal transaction in order to defeat the mortgage made by her, and the plaintiff, certainly as far as recovery of possession and foreclosure are concerned, may simply ignore the illegal transaction altogether. No case can be found holding that an immoral or illegal purpose can be set up where a conveyance has been made and the estate has actually passed. The logical result of the appellant's argument would be to make not only the mortgage but also the conveyance void, and thus to leave the estate in the plaintiff, and she can then eject the defendants as trespassers. The doctrine of public policy invoked by the appellant applies only to executory contracts: *Feret v. Hill*, 15 C. B. 207; *Ayerst v. Jenkins*, L. R. 16 Eq. 275. *Wheeler v. Wheeler*, 5 Lansing 355, has not been successfully distinguished. The law there laid down was that although the legal title was gained by a corrupt bargain, still the legal title being in the plaintiff recovery of possession must be allowed. Here Clark has by a perfectly valid and legal bargain purchased an equity of redemption, and attempts, on the ground of alleged immorality in a previous sale, to act dishonestly towards his own vendor and the plaintiff whose mortgage he has covenanted to pay. This cannot be allowed: *Farmer v. Russell*, 1 B. & P. 296; *Faikney v. Reynous*, 4 Burr. 2069; *Petrie v. Keeble*, 3 T. R. 418; *Bone v. Ekless*, 5 H. & N. 925; *Cann v. Knott*, 19 O. R. 422.

G. F. Shepley, Q. C., in reply. The order for a new trial was made without prejudice to the defendants' rights and cannot now be set up as an adjudication.

Judgment. January 17th, 1893. OSLER, J. A. :—

OSLER,
J. A.

This is a foreclosure action in which the plaintiff seeks to recover possession of the land mortgaged and foreclosure of the equity of redemption in default of payment of the mortgage money.

The plaintiff is the original mortgagee; the defendant, O'Neil, the mortgagor, and the defendant, Clark, the purchaser of the equity of redemption. O'Neil has been dismissed from the action, and no personal order is sought or can be made against Clark. The mortgage is to secure the purchase money of the land which had been sold by Hager to O'Neil. Clark pleads that the consideration for its execution was illegal and immoral, that the mortgage is therefore void, and that public policy requires that the Court refuse its aid to the plaintiff in the attempt to enforce it, and thereby to ratify the immoral transaction.

The nature of the immorality relied on is that the house and premises mortgaged had been used by the plaintiff as a house of ill-fame, and that she sold them to O'Neil, knowing that the latter intended to use them for the same purpose; and that the "goodwill," as it has been called, of this business, formed an element of and was part of the value or price of the land to secure which the mortgage was given. Clark is an innocent purchaser from O'Neil for value and without notice, and agreed with her to assume or discharge the mortgage as part of the purchase money.

After a careful examination of the authorities cited on the argument, I am not prepared to hold that any rule can be drawn from them opposed to the view taken by my learned brother Street at the trial, viz.: that if nothing more be shewn than that the plaintiff had carried on an immoral business upon the premises, and sold them, knowing that in all probability it would continue to be carried on by the defendant O'Neil, doing nothing to further it, and not consenting to or participating in such user, as *e. g.*, by selling the premises for the purpose of continuing to

carry it on, but was simply turning the land into money, the law does not go so far as to hold that she shall not recover the premises mortgaged.

Judgment.

OSLER,
J.A.

What the law says is: You shall not stipulate for iniquity. If the value of the land was shewn to have depended upon its value for the illegal purpose to which the plaintiff had put it, and to which O'Neil, if she was so minded, might continue to put it, or if it was sold or bought for the purpose of carrying on an unlawful business, the consideration would, no doubt, be tainted and could not be recovered; but if these elements are non-existent, as the learned trial Judge finds, it appears to me that the law does not interfere to prevent the sale and purchase of land for whatever may be its actual value to the owner.

This, however, is not an action for the recovery of the purchase money, and whatever room there might be for difference of opinion as to the plaintiff's rights to recover under the circumstances in such an action I am clearly of opinion that she is entitled to succeed on the broad ground, which was also taken by my brother Street, that her legal title gives her the right to the possession of the land. It can make no difference that the deed upon which she immediately relies is a mortgage. It is upon its face a deed perfectly valid and free from objection, and the legal estate passed by it to the plaintiff.

Even were it held that no estate passed, that it was void to all intents and purposes, the defendant shews that the deed under which he claims is equally invalid, being part of the same transaction and depending upon the same consideration, and the result would be that the plaintiff falls back upon her original title; the deed and mortgage both being out of the way. But the plaintiff may well rest upon her mortgage deed. She makes out her case without any evidence affecting the transaction between herself and O'Neil with illegality; and while an illegal contract confers no rights which the Courts will actively enforce, such rights as she may possess independent or irrespective

Judgment.

OSLER,
J.A

of it will of course be recognized. The principle is that the estate has passed by the deed, and that the Court will not aid the fraudulent grantor or one claiming in privity with him to attack it. The grantee succeeds, not upon proof of the fraudulent contract which may have preceded the deed, but as owner of the estate which it operates to pass. Her position does not differ substantially from that of the grantee under a deed which since its execution has been altered. The alteration does not operate to reconvey or take away the estate which has once been conveyed by it, or to prevent it from being used to shew its operation in its unaltered condition, though no action can be maintained upon any covenant contained in it: Williams on Real Property, 17th ed., 146, 147; Smith on Real and Personal Property, 6th ed., sec. 2502; *Chessman v. Whittemore*, 23 Pick. 231; *Herrick v. Malin*, 22 Wend. 388. I will refer to two or three of many cases which illustrate this proposition. In *Doe dem Roberts v. Roberts*, 2 B. & Ald. 367 (1819), the husband of the defendant had conveyed the premises in question to the defendant. It was proved that the avowed object of the deed was to give the plaintiff a colourable qualification to kill game and to get rid of an information then pending against him. Both parties were therefore guilty of an indictable conspiracy in endeavouring by this fraudulent contrivance to get rid of the information. Bayley, J., said: "This defence ought to have had no weight. By the production of the deed the plaintiff established a *prima facie* title; and we cannot allow the defendant to be heard in a court of justice to say that his own deed is to be avoided by his own fraud." Holroyd, J.: "A deed may be avoided on the ground of fraud, but then the objection must come from a person neither party nor privy to it, for no man can allege his own fraud in order to invalidate his own deed. * * The estate passed by the execution of this deed, and until a reconveyance takes place the plaintiff is entitled to the possession of it." The case of *Roberts v. Roberts, Daniell*, 143, was a bill in equity between the same

parties by the devisee of the grantor against the grantee, the plaintiff at law, to restrain the action at law, and to deliver up the deed to be cancelled, and to reconvey the premises to the plaintiff. The bill was retained until after the trial of the action. The Court expressed the opinion that the plaintiff was not entitled to a reconveyance. Then there is the case of *Scarfe v. Morgan*, 4 M. & W. 270, an action of trover for a mare which had been sent to the premises of the defendant to be covered by a stallion belonging to him. The defendant claimed a lien for his charge, and the plaintiff contended that the contract having been made and executed on a Sunday, it was void by statute 29 Car. II. ch. 7, and so the lien did not exist. As to this, Parke, B., said: "This is not the case of an executory contract; both parties were in *pari delicto*,—it is one which has been executed, and the consideration given; and although in the former case the law would not assist one to recover against the other, yet if the contract is executed, and a property either special or general has passed thereby, the property must remain; and on that ground also this lien would be supported, though it were or might have been illegal to have performed this operation on a Sunday." Again in *Ayerst v. Jenkins*, L.R. 16 Eq. 275, Lord Selborne laid it down (I quote from the head note of the report) that a Court of Equity will not at the instance of a settlor or his legal personal representative, adversely set aside a settlement by which the settlor confers on a stranger the absolute beneficial interest in property legally vested in trustees, although such settlement may have been made for an illegal consideration not appearing on the face of the instrument. And, with a reservation not necessary to be noticed here, he says: "I think it consistent with all sound principle, and with all authority, to recognize the importance of the distinction between a completed voluntary gift, valid and irrevocable in law, * * and a bond or covenant for an illegal consideration, which has no effect whatever in law. In *Whaley v. Norton*, 1 Vern. 483, the Master

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

of the Rolls said 'that there would be a difference in these cases between a contract executed and executory, and that this Court would extend relief as to things executory, which, if done, it may be might stand.'" See also *Pawson v. Brown*, 13 Ch. D. 202, where this case was distinguished: *Cecil v. Butcher*, 2 Jac. & W. 565; *Fletcher v. Lord Sondes*, 3 Bing. 501; *Wheeler v. Wheeler*, 5 Lans. 355.

The result is that the plaintiff is in any view entitled to recover possession of the land, while the defendant if he desires to retain possession or to redeem must do so, as Street, J., says, upon the equitable terms of paying the plaintiff the balance of her purchase money and costs, and if he does not do this, he must be foreclosed.

For these reasons I think that the appeal should be dismissed.

MACLENNAN, J. A. :—

The same grounds which were relied on for the defendant in the Courts below were very elaborately argued before us.

The mortgagor being no longer before the Court no question remains of liability on the covenant, for the plaintiff can have no claim under the covenant against the defendant Clark, the purchaser of the equity of redemption.

I do not think it necessary to discuss the question whether the plaintiff was shewn to have participated to such an extent in the immoral purpose and intention with which the defendant O'Neil bought the property, further than to say that the argument has not led me to think that my brother Street's judgment, or that of my brother Ferguson, on that point is wrong, for I think the plaintiff's right to recover the land on the strength of her legal title is so clear, that I prefer to rest my judgment upon that.

A conveyance of land, or a transfer of goods, may be made without any consideration, or for an illegal or immoral consideration. The absence or illegality of consideration does not prevent the title of the land, or the property in

the goods, from passing ; and so the mortgage deed in question passed the legal title to the land comprised therein to the plaintiff, and the plaintiff's legal title is complete. If it were not so, and if the immoral consideration made the transaction wholly inoperative and void, then it applies equally to the deed as to the mortgage, and if the mortgage is void, so is the deed, and the plaintiff's original title, which is admitted and is indisputable, remains, and she is entitled to recover the land. The defendant cannot escape from this dilemma. It is he who sets up the illegality. The plaintiff puts in a conveyance from O'Neil. The defendant attacks it as invalid, but in doing so shews that his own title is affected by the same invalidity, and that the true title is in the plaintiff, and that she is entitled to recover.

Judgment.

 MACLENNAN,
 J.A.

But if the alleged illegality were confined to the mortgage alone, I am clearly of opinion that the plaintiff would still be entitled to our judgment.

In *Ayerst v. Jenkins*, L. R. 16 Eq. 275, Lord Selborne, who sat as Lord Chancellor for the Master of the Rolls, shews very clearly that the rule of law which holds contracts made upon immoral consideration to be invalid, is confined to executory agreements.

That was an action by the legal personal representative of a settlor to set aside a settlement, whereby shares were transferred to trustees upon trust for the settlor's deceased wife's sister, whom he was then about to marry, and whom he did marry two days afterwards, and with whom he lived as man and wife until his death. The Lord Chancellor decided the case partly on the ground of delay, but mainly on the ground that the property in the shares having passed, the maxim *in pari delicto potior est conditio defendentis* applied, and in summing up his judgment he says : " There is no legal ground on which the efficacy of the transfer of the shares in question can be disputed ; and, so far as equitable considerations enter into the case, they appear to me to be in favour of the defendant."

The point in this judgment which is most pertinent to

Judgment. consideration upon the face of it, because that is not the
MACLENNAN case. The plaintiff could and did make out her title with-
J.A. out proving any illegality, and the rule is applicable to
defendants as well as to plaintiffs. In *Montefiori v. Montefiori*, 1 W. Bl. 363, Lord Mansfield said: "No man shall set up his own iniquity as a defence, any more than as a cause of action."

At page 360, Mr. Pollock says, the test for the application of the rule is whether the plaintiff can make out his case otherwise than through the medium and by the aid of an illegal transaction to which he himself was a party. That language is quoted from the judgment of Mellor, J., in *Taylor v. Chester*, L. R. 4 Q. B. 309, and it was cited with approval by the Court of Appeal in *Herman v. Jeuchner*, 15 Q. B. 561, and again in *Kearley v. Thomson*, 24 Q. B. D. 742. In *Begbie v. Phosphate Sewage Co.*, L. R. 10 Q. B. 499, at p. 500, Cockburn, C. J., stated the same principle, thus: "The plaintiff cannot present his case to a jury without necessarily disclosing the unlawful purpose in furtherance of which the money was paid;" and it is further enforced in *Scott v. Brown*, (1892) 2 Q. B. 724. The rule seems to be as stated by Lindley, L. J., in this last case, p. 728: "If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him."

Now, in the present case, the plaintiff put in the mortgage deed, which was admitted. That completed her case without shewing any illegality, and entitled her to recover. I lay no stress upon the admission. It would have been quite the same if the execution of the deed had been proved in the usual way. It is the defendant who then became exposed to the rule. He had to prove, not his own turpitude, but that of the person under whom he claimed, in order to make a defence, and from that the rule excludes him. He cannot go into the immoral consideration. He is entitled, however, to redeem, because that right appears by the deed, and does not depend for proof upon the nature of the agreement.

I therefore am of opinion that the appeal should be dismissed.

HAGARTY, C. J. O.:—

Judgment.

HAGARTY,
C.J.O.

I agree in the result arrived at by my brother MacLennan, but I wish to point out the proceedings under which the new trial was ordered.

The Divisional Court, after judgment had passed for the plaintiff on the undefended trial by Armour, C. J., were asked for a new trial on affidavits of both defendants and their solicitors.

The affidavits affirm that the property was only worth at most \$3,000, and that the residue (about \$2,000), was for "the goodwill," O'Neill swearing she was defending the action as to this \$2,000, and the other defendant swearing also that this extra sum was for "goodwill."

The Court directed a reference to find the full amount due on the mortgage, less \$2,000.

The reference shewed the amount to be \$2086.

The Court ordered that upon payment of that sum the plaintiff do execute a release of the mortgage "save as to the amount of \$2,000 of principal and interest."

That upon payment being made a new trial be had between the parties; in default, the motion was to be dismissed with costs. Payment, etc., was made accordingly.

Now, it seems to me abundantly clear that the Court established the mortgage as a good security except as to the \$2,000, alleged to have been paid and included in it, being for the "goodwill," as they call it.

That the trial should have been confined to this question is, to my mind, clear.

The opening statement also shews this:—

Mr. Smyth—I put in the mortgage, which is admitted.

HIS LORDSHIP—That, on the face of it, entitles the plaintiff to a reference, unless something is shewn to the contrary.

Mr. Holmes—The contention is that this mortgage was given as part of the purchase money of this house, No. 52 Albert street, Toronto. As a defence to this action, the defendants set up that the house was bought, to the know-

Judgment.

HAGARTY,
C.J.O.

ledge of the plaintiff, by the defendant O'Neil, for the purpose of carrying on a house of ill-fame; that part of the consideration for the place was the goodwill of this place as a house of ill-fame, and therefore, being an illegal consideration, the plaintiff cannot recover; that the amount paid is the full value of the place at the time it was bought; and we say the amount in dispute now, \$2,000, was for the goodwill of the place as I say. The amount of the sale was \$5,000, \$3,700 claimed to be due on the mortgage.

HIS LORDSHIP—There was a reference apparently, and it was found the amount due was only \$2,086.

Mr. Holmes—There is no dispute as to the amount. At the time the place was bought, it was bought as a house of ill-fame for a house of ill-fame, and we say that \$2,000 of that \$5,000 was given for the goodwill of the place as a house of ill-fame. And we say that is an illegal consideration.

The defence, which was never amended, claimed that the mortgage was wholly null and void, and in some way or other the trial drifted away from the sole point on which it had been granted, to decide, namely as to the \$2,000 for the goodwill, and so on the lengthened argument in this Court.

My brother Street found distinctly that the actual selling value of the property was \$5,000, and that this value was irrespective of any proved consideration for the alleged "goodwill;" or in other words, for the future use of the place as a brothel.

That finding would alone, as I think, fully support his judgment.

The mortgage had been already adjudged to be valid; only this portion of the consideration being impugned.

On the wide ground of the mortgage being void I do not consider that the defendants can urge it against the decree of the Chancery Division, and their submission to it.

BURTON, J. A., concurred.

Appeal dismissed with costs.

HILES V. ELLICE.

CROOKS V. ELLICE.

Drainage—Municipal corporations—By-law—54 Vic. ch. 51 (O.)

Under the "Drainage Trials Act, 1891," 54 Vic. ch. 51 (O.), the referee has power to award either damages or compensation whether the case before him be framed for damages only or for compensation only, and on such a reference it is unnecessary to consider whether the by-laws in question are or are not invalid.

Reports of the referee upheld, BURTON, J. A., dissenting on the ground that in the one case there was a reference of the action and not a transfer under 54 Vic. ch. 51, sec. 19, and that in the other case the reference was not within the Act.

Held by BURTON, J. A., that an action for negligence is not maintainable against the municipality unless the Council has interfered in or undertaken the construction of the work, and *quære* whether in such a case the members of the Council might not be personally liable.

THESE were appeals from reports of B. M. Britton, Q. C., Statement.
Referee under the Drainage Trials Act, 1891.

The plaintiff Hiles was a farmer living in the township of Ellice, in the county of Perth, and was the owner of lands in the township of Elma in that county.

The plaintiff Crooks was a farmer also living in the township of Ellice, and was tenant of a farm in the township of Elma, his lease being dated the 21st March, 1887.

Hiles brought his action on the 18th November, 1890, claiming payment of damages alleged to have been sustained by him by reason of the defective construction of a drain, which had been built, under the authority of a by-law (No. 198) passed by the defendants on the 18th of May, 1885, from a point in the township of Ellice into the township of Elma. The plaintiff's contention was that the drain was not carried to a proper outlet, and that the waters collected by it were brought down upon his land; that the by-law was unauthorized and passed without jurisdiction, and that there had been actual negligence in the construction of the drain. The defendants afterwards built, under authority of a by-law (No. 265) passed on the 4th of August, 1890, an outlet to the drain, carrying its waters into the river Maitland.

Statement. This outlet drain crossed part of the land of the plaintiff Hiles, and he claimed damages for land that was taken, and also for the expense of fencing and bridging.

The petition upon the authority of which the defendants passed the first by-law was signed only by persons residing in the township of Ellice, whilst the scheme affected a large number of persons residing in the townships of Elma and Logan.

The action came on for trial at Stratford, on the 19th of October, 1891, before FALCONBRIDGE, J., who "referred the action and all questions arising therein to B. M. Britton, the Referee appointed under the 'Drainage Trials Act, 1891,' pursuant to the provisions of the said Act."

Crooks brought his action on the 14th of August, 1891, claiming damages for crops destroyed and for interference with cultivation; and on motion of the defendants, made on the 17th of October, 1891, before BOYD, C., "this action was referred to the Referee appointed under 'The Drainage Trials Act, 54 Vic. ch. 51.'"

The actions were then tried together before the Referee, who held that the defendants had no jurisdiction to pass the by-law in question; that they had not carried the drain to any proper outlet; that the drain caused waters to flow on the lands of the plaintiffs; that the work was not properly done; that as the by-law was illegal the defendants were not protected by section 338 of the Municipal Act, R. S. O. ch. 184; that the damages caused by the first drain were not such as were contemplated by section 591 of the Municipal Act, R. S. O. ch. 184, so as to necessitate the assessment thereof by arbitration; and that even if they were, there was power under the Drainage Trials Act to assess them; that the plaintiff Hiles was entitled to \$270 as damages with costs, and that the plaintiff Crooks was entitled to \$170 and costs.

The defendants appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 21st, 22nd, and 23rd of November, 1892.

M. Wilson, Q. C., and *E. Sidney Smith*, Q. C., for the appellants. Argument. When this work was done, there was no power to continue the drain for outlet purposes, and the defendants did all that they could. If any injury was caused by the want of an outlet, then the township of Elma must raise the question and not ratepayers in that township. See section 581. Crooks at all events cannot raise any objection to the first by-law, as he took his lease after the by-law had been passed and the work had been partially done. If the by-law is valid, there is clearly no right of action at all but merely a right to compensation, and even if the by-law is invalid, there is no right of action until it is quashed. *Williams v. Raleigh*, has not changed this rule but turned on the point that the by-law was wholly illegal. Here the defendants employed competent engineers and contractors, and cannot be held responsible. The Referee had power only to try the questions in issue in the actions, and was not in fact acting under the Drainage Trials Act, and could not arrogate to himself the right to give compensation as under the Municipal Act, if no right of action existed.

J. P. Mabey, and *F. W. Gearing*, for the respondents. The petitions upon which the by-laws were founded were not properly signed. There was not a majority of ratepayers living in the drainage area, and the township had no jurisdiction whatever to pass the by-laws, and being wholly illegal, there was no necessity for quashing them. Moreover there is a right of action because of the actual negligence of which the defendants have been guilty. It is, however, immaterial whether there is or is not a right of action, as under the Drainage Trials Act the Referee has the power to give either damages or compensation. The plaintiffs are either entitled to damages strictly so called, or to an allowance by way of compensation, and the result arrived at will be precisely the same; and, as the amounts allowed are certainly reasonable, the reports ought not to be interfered with.

M. Wilson, Q. C., in reply.

Judgment. HAGARTY, C. J. O. :—

HAGARTY,
C.J.O.

These suits are against the corporation of the township of Ellice for damages to the respective lands of the plaintiffs, who both reside in the adjoining township of Elma, and were tried and argued together.

The complaint in each is for injuries from overflow of water brought down by Ellice into Elma.

The plaintiff Hiles claims as owner of lot 21, 14th concession of Elma, that under a by-law 198, the defendants cut a drain in Ellice going into Elma. He sets out certain objections to the by-law as to the insufficiency of the petition. He then alleges that he had no notice of this work, and that his lands were not assessed therefor; that there was no proper outlet, or any outlet, but that the defendants stopped their work, leaving the water collected from a large area "turned loose," and that by the result of this negligence, it flowed over his land; that actions for damages from overflow having been brought by other proprietors in Elma, the defendants passed another by-law, reciting that the first drain had not been brought to a proper outlet, and thereby providing to carry the drain to some outlet and get rid of the waters, and for the continuance of the drain across certain named lots including his lot; that thereunder they have entered on his land and excavated, etc., etc., thereon so as to require bridges, etc.; that they are trespassers, not having observed the legal formalities, no petition for the last drain; no Court of Revision held, etc.

The plaintiff is assessed for this last drain.

He claims for injuries to and loss of crops, and for permanent injury by reason of defendants' neglect resulting in their having to cut this outlet across his lot instead of in its proper course.

Defence:—That by-law was duly made and has not been quashed; that there was no negligence, and so that they are not responsible; that after the drain was made, it became necessary, and was held expedient on a

report of surveyors recommending it, to extend the drain to a new outlet, and therefore defendants lawfully passed the second by-law (No. 265); that there had been no application to quash or appeal, and that defendants proceeded with the work, and having done only their duty without negligence they are not responsible, etc.

That no compensation having been agreed on nor settled by arbitration, action is not maintainable, compensation is the only remedy, etc.

That the benefit to the plaintiff will largely exceed any loss.

The claim in Crooks' case is exactly the same as Hiles, with the additional statement that he is tenant of this lot (20 in the 14th concession) and that as lessee he was bound to clear for cultivation, but by reason of this overflow he was prevented from so doing, that his crops were injured, and that he sustained other loss. The defence is in substance the same as in Hiles' case; by-law not quashed, and no liability, even if engineer did not furnish any proper outlet; action does not lie, only compensation; that plaintiff took his lease with notice of all the risks he ran from the operations complained of.

The Act, 54 Vic. ch. 51, passed some months before these references, in May, 1891, gives very large powers. Section 3 gives the Referee all the powers of the High Court, and of arbitrators under the Municipal Act as to determining the legality of all petitions, including the original petition for the work. Section 2 gives him all the powers of arbitrators as to compensation for lands taken or injured. Section 9 provides that in case of disputes, etc., the municipality or individual may refer the same to the Referee as to damages done to property of the municipality or individual. Section 11 allows any action for damages to be referred by Court or Judge. Section 17 gives an appeal to this Court. Section 19 provides that in actions for damages, if the Court thinks that the proper proceeding is under this Act, the Court or Judge may order its transfer to the Referee at any stage, etc. In case no

Judgment.

HAGARTY,
C.J.O.

Judgment.

HAGARTY,
C.J.O.

application therefor be made, the Court or Judge may dispose thereof as a matter within the jurisdiction of the Court, subject to appeal, and notwithstanding any Act or Acts, the jurisdiction shall be deemed to include all relief within the powers of the Referee as well as any other relief within the powers of the High Court.

I consider that, under this Act, the Referee has power to award either damages or compensation in all claims before him, and this, whether the case be framed as for damages only, when the Referee finds it to be properly only a claim for compensation under the statutes; and that both the cases before us must be so treated, and if they had not been referred, the trial Judge could have so disposed of them.

In holding the original by-law to be illegal for insufficiency of the petition, the Referee has opened up a very large field of enquiry. If invalid on its face in a Court of Justice it could not be supported. An objection like this requires some consideration.

In my view the plaintiffs are entitled to damages, whether the by-law can or cannot be supported.

I think the learned Referee had ample ground for holding as he did.

He finds all the damages to have been caused by the work done under the first by-law; that it was not properly or skilfully done; that it was left for a long time unfinished at lot twenty-five, with a flood of water pouring through it and spreading on adjacent lands; that it was "turned loose" upon lands in Elma, and by reason thereof some of it reached these lands causing damages.

I am unable to accept the argument that one township can collect the water from a large area and discharge it just inside the line of another township, where it is let loose, without being liable for damages to those injured.

In 1885, when the by-law was passed, it is said there was no power to carry it into an adjoining township. The additional power was given in the following year by the Act 49 Vic. ch. 37, sec. 27 (O.), so as to get sufficient outlet for water.

The defendants' engineer, Cheeseman, says that the water was brought to the town line of Elma, where it was up to November, 1886; and that he considered he had done his duty under the Act; that getting rid of it from Ellice was sufficient.

The contract was let in August, 1885. The contractor seems to have abandoned or left the work, and a delay of a year took place. Cheeseman's statement seems clear that the water was kept back all 1886 to the town line.

We may gather from the evidence that the execution of the first by-law caused a very large amount of damage to land in Elma, including the lots of these plaintiffs.

In March, 1886, the additional power was given by statute, and the defendants could then by reasonably prompt action have averted much of the evil consequences. But the matter was allowed to drag on, and the second by-law was not passed till August, 1890. An outlet was finally obtained, but not completed till 1891 or later.

The damage claimed was in 1887, 1888, 1889 and 1890. The tenant Crooks did not enter on his farm till April, 1887, and his claim began as to his crops of that year.

I can see no objection to his right to damages on the evidence. He is not claiming compensation for any permanent injury legalized by the Legislature, and necessarily inflicted by the exercise of municipal powers. It is not necessary to discuss the position of a tenant for years as to permanent injury. Our Legislature has not, I think, specially provided for compensation to tenants as has been done in England.

The Imperial Lands Clauses Act, 8 and 9 Vic. ch. 18, secs. 119, 120, 121 and 122, provides for compensation in the case of tenants. See 1 Hodges on Railways, 7th ed., p. 243.

It is not necessary here to determine the right as to tenants. I may say, however, that I do not see why they should not be entitled under the words of our Act, section 483, which directs compensation to be made to "the owners, occupiers of, or other persons interested in, real property entered upon, etc., or injuriously affected by the exercise of its powers."

Judgment.

HAGARTY,
C.J.O.

Judgment.

HAGARTY,
C.J.O.

Words to a like effect are in the Railway Act, R. S. O. ch. 170, as to owners and occupiers and all persons interested.

In Hiles' case an allowance is made to him by the Referee for damages and permanent injury, charging against that the resulting benefit from the works, in all \$270. Crooks gets \$170 for damages alone. I can see no reason for interfering with the learned Referee's decision in either case, and I think both appeals should be dismissed.

I cannot but lament the enormous amount of costs involved in these appeals.

It seems a matter of regret that a man cannot venture on a complaint of this character, involving two or three hundred dollars, without running the terrible risk, if unsuccessful, of becoming liable for thousands.

We have an appeal book here running up to 500 pages. I feel bound to notice the unjustifiable printing of a large amount of matter of no possible interest in the discussion.

A question was asked as to Crooks' relation to his landlord, and we have printed *in extenso* his lease, notices formally given to him by his landlord, writ of summons, and notices from him, a bill of sale of several printed pages, with full inventory of chattels attached and affidavit of execution. All utterly useless.

Then the schedule of lands in Cheeseman's report to be assessed, running over five pages, is set out in the first by-law in Ellice, Elma, Mornington, and Logan, and all again repeated in the enacting part of the by-law.

Then Cheeseman's report already set out in the by-law, is printed with the same list of lands, covering several pages.

Then comes the second by-law with seven pages of lots in the different townships.

Then another schedule of lots and assessments of many pages in Van Buskirk's report.

Then a by-law of Elma with another dreary list of lots assessed.

Then a by-law of Logan with a similar list of lots; and another Elma by-law with another list of lots of several pages.

We thus find six schedules of lots printed. It is difficult to understand the motive of this vast addition to the costs; or how the insertion of these schedules bears on our consideration of the case. A few lines of statement could have explained all that was required, as for instance, whether plaintiffs, or either of them, had been assessed, and when and under which by-law.

Judgment.
HAGARTY,
C.J.O.

I think we should mark our direct disapprobation by directing that at least 100 pages should be disallowed in each of these books, and be wholly disallowed on taxation to any party.

The taxing Master can also see as to the necessity of an appeal book in full being necessary in each of these cases, both being tried together.

OSLER, and MACLENNAN, JJ.A., concurred.

BURTON, J. A. :—

HILES V. ELLICE.

The first important question is as to the validity of by-law number 198, which was passed in July, 1885, with the usual notice appended that any person moving to quash must within ten days give notice of such intention.

The learned Referee has held this by-law illegal, on the ground, as I understand it, that it was not petitioned for by a majority of the ratepayers in each of the townships of Ellice, Elma and Logan; feeling himself bound by a decision of the Chancellor in *West Nissouri v. North Dorchester*, 14 O. R. 294, but with great respect I think that case is not applicable.

In that case the by-law was for the construction of a drain extending through the adjoining townships, forming one entire scheme of drainage through both townships.

Here the work petitioned for was wholly within the township of Ellice, and the only interference with any other township, except as provided for by section 576 of

Judgment.
BURTON,
J.A.

the Act of 1883, 46 Vic. ch. 18 (O.), now section 575 of R. S. O. ch. 184, was to enable the municipality to carry the water beyond the limits of their own municipality. As the law then stood, Ellice had no authority (since granted by the Legislature) to carry it sufficiently far in that township to obtain a sufficient outlet.

It is true lands in other townships were benefited, and were assessed for benefit, but that was not within the area which the petitioners proposed to be drained. The property proposed to be drained, and the drain itself, were wholly, except as I have mentioned, within the limits of the township of Ellice; the benefits that landowners obtained in the other townships were mere incidents for which the engineer was entitled to charge them under section 577 of the Act of 1883, now section 576 of R. S. O. ch. 184. But however that may be, I think that that question could only arise upon a motion to quash the by-law, and that the by-law was not so wholly void that it can be impeached in this way.

Those cases in which the Courts have held that the validity of a by-law could be collaterally impeached are cases in which there was an express prohibition to pass such a by-law, as in the case of opening highways when "no council shall pass a by-law" until certain formalities are complied with. Here is a by-law as to which no such statutory prohibition exists, and under which debentures for a very large amount have been issued.

I think that the view that the learned Referee would have taken, if not, as he thought, fettered by authority, was the correct one, viz., that the work was authorized under section 576 of the Act of 1883, and that the engineers could properly assess under section 577 of that Act.

I do not think that *Stephen v. McGillivray*, 18 A. R. 516, decides otherwise, although there are some *obiter dicta* in that case which might lead to such a conclusion.

I am of opinion, therefore, that the by-law 198 was a good and valid by-law. But the learned Referee holds that there was negligence in the construction of the work, and

if so, the by-law would afford the municipality no protection. But he proceeds to point out in what he considers this negligence to consist :

Judgment.
BURTON,
J.A.

1st. Because the drain was not properly located ;

2nd. Because there was no sufficient outlet or no outlet ;
and

3rd. Because it was left unfinished at some portion for an unreasonable time.

With great respect, I do not think that the defendants could be made liable as for negligence under either of the heads numbered one or two ; the employment of a competent engineer is all that can be reasonably required of the defendants, and the council are properly not authorized to interfere with the discretion of the engineer in any matters of detail in the construction of the work. Their discretion is confined to the adoption of the engineer's report as a whole or its rejection ; and the council in such a matter, acting upon the advice of the engineer appointed by law, is not liable for error of judgment of such engineer who is in such a matter acting judicially.

As to the second head, in addition to its being a matter for the engineer, he had no power at that time to do what it is said he should have done, that is, continue the drain through the adjoining township until he found a sufficient outlet.

If, as the learned Referee finds, the waters were "turned loose" upon lands in Elma, that could not be an actionable wrong if the defendants had authority, as they undoubtedly had in my opinion, to do the very act complained of, viz : to continue the survey and levels into the adjoining municipality until they find fall enough to carry the waters beyond the limits of Ellice. That may have been faulty legislation, and was evidently so considered, as in 1886 the law was amended ; but it gave no ground of action, although the party would not be without remedy.

The defendants might possibly under certain circumstances be liable to an action under the third head of negligence, if any evidence had been offered of interference by them as a corporation in works causing injury to

Judgment.

BURTON,
J.A.

the plaintiff; but no such injury is alleged or proved; on the contrary, the injury complained of is for damage done after the completion of the drain; but there is the additional fact that the work was let to an independent contractor, which would seem to furnish a complete answer to such an action: *Duncan v. Findlater*, 6 Cl. & F. 894; *Reedie v. London & North Western R. W. Co.*, 4 Exch. 244.

No sufficient reason has been alleged for holding the second by-law, number 265, invalid.

The law had in the meantime been amended so as to enable the township of Ellice to do what presumably they would have done at first, if they had then had authority; and thereupon the township of Ellice, on the request as is alleged of Elma, passed the by-law in question so as to obtain a sufficient outlet for the water. The by-law was never moved against, and for the reason I have already mentioned was, in my opinion, fully warranted without any fresh petition.

The plaintiff does not claim that he had suffered any injury under this work beyond the taking of his land, and the learned Referee has so found and has decided that it is a case for compensation only under the statute.

If the interpretation of the Act of 1891, and the manner in which this case was referred, were less open to doubt than I fear they are, I should have contented myself with saying that the plaintiff was entitled to recover either in the action or for compensation. But the defendants contend that if this had been a claim for compensation, then the mode of procedure is pointed out under section 5, by notice stating the grounds; if on the other hand the party has mistaken his remedy, and brought an action instead of proceeding under the arbitration clauses, then on application to a Judge, he may order the action to be transferred to the Referee on such terms as to costs or otherwise as he may see fit; in which case the order should properly recite the fact that the remedy had been misconceived, and it was transferred to the Referee to be dealt with as a case for compensation, but the Referee has also the powers of an official referee under the Judicature Act.

What the defendants contend is that the reference in this case was a reference of this kind under the Judicature Act, and when we read the order, there is much force in the contention. The reference does not proceed on the ground that the case is not one for damages, but for compensation—two widely different things. But on the case being opened and on reading the pleadings, the action and all questions arising therein are ordered to be referred to the Referee pursuant to the provisions of the Act, one of which provisions is, that an action may be referred to him instead of an official referee.

Judgment.
BURTON,
J.A.

If the contention of the defendants be correct, it follows that the only powers conferred upon the Referee in this particular case was to try the action so referred, and after some fluctuation of opinion, I have been unable to bring myself to the conclusion that the defendants' contention is not well warranted. I come to this conclusion with great regret, the more so as, if proper steps had been taken, full jurisdiction could have been conferred on the Referee, and a very large amount of expense has been incurred in reference to a very small claim. But although one's sympathies in such a case have a tendency to induce one to strain the law, I think it far better that the precise directions of the Act should be adhered to than to encourage a loose mode of administering it, which in most cases leads to future and unforeseen troubles and difficulties.

The Legislature fully recognized the difference between a reference and a transfer.

By section 11 any action for damages may at any time after the issue of the writ be referred, but in cases where the remedy has been misconceived the Court does not refer the action, but under section 19 orders the action to be transferred; and the Referee on such transfer is to give such directions as to the prosecution of the claim before him as may seem just and convenient and subject to the order of transfer in that behalf the costs are to be in the discretion of the Referee.

Judgment.

BURTON,
J. A.

The latter part of that section caused me at first to hesitate about the powers of the Referee. That section proceeds to confer upon the judge trying the case the power to convert the action into a claim for compensation; a jurisdiction not theretofore possessed. But on consideration, I think those words must be confined to their plain and literal meaning. The Legislature has not thought fit to say that a Referee to whom an action has been referred shall have a similar wide discretion, but has provided a machinery which is to be worked out in the way pointed out. If it is a claim, a proper subject for a reference, a notice is to be given and filed; if the party has misconceived his remedy, the Court has the power to transfer the case from the Court in which the action is brought to the Referee.

If no application is made to transfer, the Judge may refer the action to an official referee or to the Drainage Referee, the powers of each in such a case being the same.

I am, for the reasons I have mentioned, and for reasons which I have given at greater length in the other case, of opinion, that the action so referred was not maintainable, and that, by the express terms of the reference, that and that only was referred, and that the learned Referee exceeded his jurisdiction in awarding compensation on either part of the plaintiff's claim. Even if negligence were established, it would apply only to a portion of the claim, and the damages claimed under the last by-law are only the subject of compensation.

I have referred to the recent judgment of the Supreme Court in *Williams v. Raleigh*,* now in appeal to the Judicial Committee, to see if there is any decision of that Court to the effect that a municipal corporation can be made liable in an action for negligence, such as is here alleged, as although I may not agree in that decision, it would be my duty to follow it. Mr. Justice Patterson's judgment proceeds chiefly on the ground that the work proposed to be done under the by-law was not such a work as the statute contemplated—a point

* Now reported, 21 S. C. R. 103.

not argued or considered in this Court, as it would have been directly opposed to the admission signed by both parties and made part of the case, that the drain and work in question were done under a by-law duly made under the drainage clauses of the Municipal Act. The late Chief Justice agreed in that judgment.

Judgment.
BURTON,
J.A.

On the other hand Mr. Justice Gwynne proceeded chiefly on the ground that, as the statute was not obligatory but permissive, the corporation were liable, if the effect of the work was to cause injury to any one—the engineer being their servant. Whilst I disagree entirely from that view, it is sufficient at present to say that it was not the judgment of the Court.

BURTON, J. A. :—

CROOKS v. ELLICE.

If the by-law is illegal and void, or if the township can be made liable as for negligence on any of the grounds on which the learned Referee has found negligence, the awards should, according to the decisions in this country, be upheld. I have pointed out in the other case why, in my opinion, the municipality cannot be held liable; but I go further, and whilst it is now, I suppose, too late to hold, until the question has been finally decided by the ultimate Court of Appeal, that an action for damages is not maintainable under the circumstances of this case, I desire, as the point may possibly come up for decision in the case of *Williams v. Raleigh*, now in appeal before the Judicial Committee of the Privy Council, to intimate that the decisions in the cases in the Courts of this Province ought not to be taken as the unanimous judicial consensus of opinion of the Courts of this country on this subject. Speaking for myself, and I think I may say the same for several other members of the bench, I joined in the decisions affirming the view that an action was maintainable because I felt bound by prior decisions, not because I agreed in them.

Judgment.

BURTON,
J.A.

I have always been of opinion that, except in cases where an action is expressly given after the completion of the work, as in section 583, sub-section 2, no action is maintainable.

The position of the municipality under these clauses is peculiar; it is no part of the duty of the municipal council in such a case as the present to undertake the construction of the work.

I do not at all dispute that, if it had been the duty of the municipal council to construct these works, they would be liable, even though gratuitous agents, and without any benefit to themselves, if the work they were directed and empowered to do was negligently or unskilfully performed; and that they could not in such a case evade responsibility by employing a contractor.

But there is no such duty imposed upon the municipality in these cases; their duties (except after the completion of the work) are partly of a legislative, and partly of a judicial character, and in no case warrant them undertaking the work.

The work itself affects only a small area, and a small number of the ratepayers; they are interested in having their own property drained, and if they can procure a sufficient number of the parties interested to petition for it, they can present a petition to the council for leave to have it done at the expense of the parties interested.

The council thereupon can refer the matter to a competent engineer for his report on the feasibility of the scheme, and if feasible, to prepare plans and estimates of the work and the lots or property to be benefited; and upon that report the council is, "not to undertake the work," but to decide whether in their opinion the proposed work would be desirable. If they decide in favour of it they pass a law to legalize it and provide the ways and means from the owners of the property affected, and there their duties end.

That the exercise of such a discretion in good faith is to create a liability for damages has always appeared to me to be founded on an erroneous view of the law.

The few people affected had to obtain a law, enabling them to proceed, from the governing body of the municipality before they could proceed ; that obtained, the authority was equivalent to an Act of Parliament.

Judgment.
BUSTON,
J.A.

If the municipal council (as I believe is occasionally though I apprehend not frequently the case) should undertake to do the work by its own servants, the usual result would follow if any damages resulted from negligence, and it may perhaps be open to question whether the members taking part in it might not be personally liable. To hold that this local legislative body, for it comes to that in effect, could be liable for the unskilful execution of the work so authorized appears almost like a "*reductio ad absurdum*."

Here is a work in which only a small portion of the ratepayers are interested. The Legislature feeling that in the interest of local self-government their wishes should be given effect to, if they obtain the assent of the governing body of the whole township, provide the machinery for giving effect to them ; without that assent they are powerless, with it they are entitled to proceed at their own expense, the general rates not being in any way affected ; if damages are sustained by reason of the inefficient mode of constructing the works the contractor is responsible, and presumably those interested would see to it that he should be not only competent but a person able in a pecuniary point of view to meet any claim made upon him for damages resulting from negligence. But how the general ratepayers of the township can be made responsible to make good losses incurred by certain individuals by reason of the negligence of a contractor employed under such circumstances I have never been able to understand.

Here is a large body of ratepayers in no way whatever interested in the particular work, and the council that they have elected to represent them has no interest in it either ; but they have a right to say to the parties promoting the works, unless we are satisfied by the report of a competent engineer that it is desirable to proceed with it, we will not

Judgment.
Buxton,
J.A.

grant permission, but if so satisfied, we will give you a license to proceed.

How does that impose upon the general ratepayers a liability in the event of that work which they have merely sanctioned in this way being unskilfully performed?

There can be but one answer to such a proposition unless the Legislature has expressly made them liable, but so far from doing so, they have, I think, in section 592 declared that the liability, whatever it may be, shall be confined to those who initiated or are benefited by the works. Damages may be recovered under certain circumstances under section 583, and perhaps under other sections, and in such cases and in the case of awards under the Act the municipality is entitled to be indemnified by the owners of the lands and roads liable to assessment for the local work by the imposition of a rate.

This view of the law brings into harmony all these sections of the Municipal Act, whilst a contrary view would be attended with great inconvenience, and it is difficult to see what authority there would be to levy a general rate or assessment upon the ratepayers generally for such a purpose.

The creation of our municipal corporations by the Legislature is for the convenient and efficient administration of local government and not for the purpose of conferring any peculiar benefit upon the township or other corporation or its inhabitants. The English authorities hold, I think, that the parties bound at common law to repair the highways being liable to indictment only for neglect to repair, whenever that duty is transferred by statute to a municipal corporation or a board incorporated for the purpose, such corporation or board is not liable to a private action unless the statute transferring the duty clearly manifest an intention on the part of the Legislature to impose the additional liability. See *Cowley v. Newmarket Local Board*, 8 Times L. R. 788. That is done in this Province in express terms in the case of highways and in

case of nonrepair after notice under section 583, sub-section 2, but I see no such indication of any such intention in such a case as the present.

Judgment.

BURTON,
J. A.

As to a claim to compensation that presupposes that the work was authorized and done without negligence. I am not at all prepared to say that the person who was tenant during the construction of the work, and who sustained damages in consequence, might not be entitled to compensation, on the contrary I think the compensation clauses include such a person, but this claimant was not in such a position. The owner was then entitled to claim for all damage which was then capable of being foreseen, and in respect of such damage the compensation is assessed once for all, and if he had then only a reversion, his damage as owner would presumably be assessed, less, speaking generally, the value of the compensation awarded to the tenant; if there was no tenant he would get the whole compensation, but no action could afterwards be maintained by him or any person claiming through him as this tenant does.

I feel clear that the plaintiff is not entitled to compensation under the statute; in any other view each successive tenant for all time could claim compensation in each and every year as frequently as the damage occurred.

Whether this objection was or was not taken in the Court below appears to me to be unimportant; the facts here are not in dispute, and it is a pure question of law; and in such a case we have the authority of the Judicial Committee for holding that it is not only competent but expedient in the interests of justice to entertain it: *Connecticut Fire Ins. Co. v. Kavanagh*, 8 Times L. R. 752.

Appeals dismissed with costs,

BURTON, J. A., *dissenting.*

HOLLINGER V. CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Negligence—Ways—Crossing—Station yard—51 Vic. ch. 29, sec. 256 (D.).

A highway crossed the defendants' line at right angles; their passenger station lay adjacent to the highway on the east, and their shunting ground and yard adjacent to it on the west. The shunting yard was less than eighty rods in extent from the highway, and eight tracks crossed the highway with intervals of a few feet between them. The defendants in shunting a train of flat cars drew them from the east end to the west end of the yard, and after a pause backed them easterly. After backing for some distance the engine uncoupled from the train of cars, switched upon another track to the south, and the train and engine both continued to back down on different tracks to the highway, at a speed of about six miles an hour. At the time the plaintiff was proceeding along the highway from south to north and was about to cross the tracks. The flat cars had reached the highway and were passing over it. The plaintiff, while watching these in front of her, did not see or hear the engine coming down on the other track, and was struck by the tender and injured. There was no look out man on the tender, and there was contradictory evidence as to the ringing of the bell at all, though at most it was not rung until the engine had run some distance towards the highway, and the whistle was not blown. The jury found that the accident was caused by the negligence of the defendants, and that the negligence consisted in not ringing the bell in time:—

Held, per HAGARTY, C. J. O., that there was sufficient in the general facts of the case to justify a verdict in favour of the plaintiff.

Held, per OSLER and MACLENNAN, JJ. A., that whether section 256 of the Railway Act, 1888, applied or not under the circumstances of this case, the defendants did not object to its application by the trial Judge, and the jury having on contradictory evidence found negligence against them in not ringing the bell in passing over the distance from the starting point to the crossing, the verdict should not be interfered with.

Per BURTON, J. A.—That section 256 did not apply to shunting in a station yard, and that there had been misdirection on that point, but that the defendants had no right to use the highway as part of their station yard, and were therefore trespassers *ab initio* and liable for all damages resulting from their dangerous use thereof.

In the result the judgment of the Queen's Bench Division, 21 O. R. 705, was affirmed.

Statement. THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 21 O. R. 705.

The plaintiff, who was a middle-aged woman, brought the action to recover damages sustained by her by being knocked down by an engine belonging to the defendants. The accident took place near the station of the defendants, at Orangeville, at about half-past seven in the

morning, on the 7th of July, 1890. The station grounds and yard of the defendants at Orangeville extended on both sides of the public highway running from the station to the town, and there were eight tracks crossing this highway. When the accident happened, the defendants were shunting cars in the station yard, using for that purpose an engine with tender attached. Some flat cars were taken out of the freight shed at the east end of the yard, were drawn to the west end of the yard on one track, and were then, after a pause, shunted to another track to the south, the engine pushing them along that track some distance, and then being uncoupled and allowed to run along a third track still further south. The plaintiff was waiting on the highway south of the tracks to cross, and as soon as the flat cars passed she started across, but was struck by the tender of the engine. The engine and tender were about twenty or thirty feet more to the west than the last of the flat cars, and the engine was running with steam shut off at the rate of five or six miles an hour.

There was no look-out on the engine or tender. The fireman stated that he saw the plaintiff when the engine was about twenty or thirty yards from the highway, but gave her no warning, thinking that she would not attempt to cross until the engine had passed. There was the usual contradictory evidence as to the ringing of the bell, the fireman swearing that he commenced to ring the bell very soon after the engine reversed, and about 130 yards from the highway. The whole distance from the west end of the yard to the highway was considerably less than eighty rods.

The action was tried at Orangeville on the 11th of May, 1891, before STREET, J. The following were the questions submitted to the jury, and their answers thereto:

Was the accident caused by any negligence of the defendants? It was.

If so, what was the negligence which caused the accident? By the bell not ringing in sufficient time.

Statement.

Was the bell on the engine rung before the accident? It was.

If so, for what distance was it kept ringing? A very short distance.

At what rate was the engine travelling? In or about six miles per hour.

Was the place of the accident in a thickly populated portion of the town? It was not.

Could the plaintiff, by using reasonable care, have avoided the accident? We believe plaintiff took reasonable care, her attention being taken by the flat cars moving.

If the plaintiff is entitled to damages, at what sum do you assess them? We believe plaintiff was entitled to damages to the amount of \$800.

Upon these answers, the learned Judge entered judgment for the plaintiff for \$800 and costs, and a motion by the defendants to the Queen's Bench Division to set aside this judgment was dismissed with costs.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 30th of November, and 1st of December, 1892.

R. M. Wells, Q. C., for the appellants. The finding that the bell was only kept ringing for a very short distance is not supported by the evidence. The only evidence as to distance is that of the fireman, who swears that the bell was ringing for at least 130 yards west of the highway, and the jury could only find that it was not rung at all or else that it was rung for the distance mentioned. It is submitted however that it was not necessary to ring the bell at all. The section directing that the bell is to be rung for a certain distance before coming to a highway does not apply to such a case as this. The section in question is under the general heading "working of the railway" and applies clearly to the running of passenger and freight trains. The regulation could not be complied with

in station yards, as no station yard is more than eighty rods long, and this has been noticed in some of the cases: See *Bennett v. Grand Trunk R. W. Co.*, 3 O. R. 446; *Casey v. Canadian Pacific R. W. Co.*, 15 O. R. 574. If the distance mentioned in the statute is adopted as a criterion and eighty rods is looked upon as a reasonable distance where a train is travelling at full speed, say at sixty miles an hour, then in such a case as this where the engine is moving at not more than six miles an hour eight rods would be a reasonable distance during which to keep the bell ringing. This nonringing of the bell is the only negligence pointed out by the jury, and that finding is really impliedly a finding against any other kind of negligence. The right of recovery, however, is sought to be supported on the ground that the fireman saw the plaintiff and did not warn her or tell the engine-driver to stop, and *Radley v. London and North-Western R. W. Co.*, 1 App. Cas. 754, is cited as to this; but this case does not apply. It was quite reasonable for the fireman to think that the plaintiff would not cross the line. There was nothing in the plaintiff's appearance to make any one think that she needed particular warning, and she was in fact shewn to be an active intelligent woman. It was her duty to stop and look carefully before crossing the tracks, and not having done so she ought not to be allowed to recover: *Davey v. London & South-Western R. W. Co.*, 11 Q. B. D. 213, 12 Q. B. D. 70; *Scott v. Dublin, etc., R. W. Co.*, 11 Ir. C. L. at p. 397 (1861); *Boyd v. Wabash, etc., R. W. Co.*, 16 S. W. R. 909; *Moody v. Pacific, etc., R. W. Co.*, 68 Mo. 470; *Telfer v. Northern R. W. Co.*, 30 N. J. (Law) 188. Another ground taken is that there was no one on the tender to give warning, and the section requiring a man to be at the rear of a train is invoked, but this applies only to a train of cars. There is a distinction all through the Act between a locomotive and a train of cars, and it would be a very strained construction to apply this provision to a mere locomotive engaged in shunting. The point is now made clear by the amending Act, 55 Vic. ch. 27, sec. 9 (D.).

Judgment. January 17th, 1893. HAGARTY, C. J. O.:—

HAGARTY,
C.J.O.

On the best consideration that I can give this case I arrive at the conclusion that we ought not to interfere with the judgment for the plaintiff.

I can find no misdirection on the part of the learned Judge, and on the defendants' part none is complained of, either at the trial or on motion in the Divisional Court, or in the reasons for appeal; beyond that the Judge ought to have nonsuited and not have entered a verdict for the plaintiff on the findings. Questions were submitted to the jury without objection on behalf of the learned and acute counsel for the defence, who did not ask or suggest any further question.

The Judge could not have nonsuited.

The jury found that the defendants were guilty of negligence, consisting in not ringing the bell in sufficient time; that the bell was rung for a very short distance; that the plaintiff took reasonable care, her attention being taken by the flat cars moving across the highway on a track beyond and parallel to the track she was about crossing.

The defendants cannot complain of the learned Judge's direction and advice to the jury on the question of contributory negligence when he said "it was the duty of every person coming to a railway track to look out carefully to see whether it was safe to cross or not."

I fully agree in this view and, speaking for myself, I wish the omission so to do should, as in some of the States, be a legal bar to a recovery.

The main contest at the trial was as to the ringing of the bell, and there was very contradictory swearing on that point; on the one side that it was not rung at all, on the other that it was ringing for 130 yards before reaching the highway.

The learned Judge said the law required the bell to be rung, and he again speaks of the neglect to ring being a breach of the rules of the company.

I do not see any objection whatever urged to this direction, even if it were open thereto.

The learned counsel for the defendants would hardly have urged that the company could be constantly crossing and recrossing this important highway over which they had eight or nine tracks in their yard, without the ordinary warning.

I think it was clearly a matter for the jury to find whether reasonable care had been used and reasonable ordinary notice given of the engine being about to cross. The jury in effect say the bell was rung, but not from a sufficient distance for ordinary warning process.

It is very probable that as a jurymen I would have refused to make the company liable on the evidence as reported to us.

But I do not see my way clear to interfere with the conclusions at which I think the jury have arrived.

It is not necessary to discuss some of the reasons for the decision arrived at in the Divisional Court, some of which were not discussed at the trial.

OSLER, J. A. :—

I am of opinion that the judgment of the Queen's Bench Division should be affirmed. We must not criticise too closely the way in which the questions submitted to the jury and their answers are framed. Ambiguities which can be corrected, ought to be corrected at the trial and not set up afterwards to defeat the proceedings. I think the jury have found negligence against the defendants in respect of their not ringing the bell in sufficient time, and not for the distance they might and ought to have kept it ringing, it being clear that the engine started from a point short of the distance from the crossing at which, if there were so great a distance, they were bound by law to keep it ringing for eighty rods. There is evidence in support of that finding and I think we ought not to interfere with it, there being no reason to suppose that any injustice has been done to the defendants by reason of it, or that the result of a new trial would be different.

Judgment.

HAGARTY,
C.J.O.

Judgment.

OSLER,
J.A.

It is unnecessary to express an opinion whether the 256th section of the Railway Act, 1888 [51 Vic. ch. 23 (D.)], casts upon the defendants the duty of ringing a bell or sounding the whistle in approaching and crossing a highway situated as is the highway in question, where the engine and tender are employed in shunting and are crossing the highway from that part of their yard on one side of the highway to that part of it which is on the other, the starting point being short of eighty rods distant from the crossing. It is not the case of the engine moving about from one part of the company's yard to another, in doing which it crosses a way of convenience or a way used as an approach to the company's premises or station, as in *Bennett v. Grand Trunk R. W. Co.*, 3 O. R. 446; *Casey v. Canadian Pacific R. W. Co.*, 15 O. R. 574.

Even if the section is not applicable in the circumstances of this case I think the defendants cannot at this stage of it complain of misdirection of the learned trial Judge, who thought that it was and directed the jury accordingly. His direction was not objected to and in all probability for very good reasons. Either the learned counsel for the defendants thought it was right or he thought it was a direction more favourable to him than that which would inevitably have been given had the objection been taken and yielded to by the Judge. The question would then have been whether the defendants had taken proper and sufficient or reasonable precautions to guard against accidents having regard to the dangerous character of the crossing, even though none may be in terms required by the statute. This must have been left very much at large to the jury, and it can hardly be doubted that their answer would have been adverse to the defendants. We must treat the direction as having been assented to by the defendants' counsel, and that the jury were in effect told that the defendants were at least bound to take the precaution of ringing the bell or sounding the whistle in passing over the distance from the starting point to the crossing. This was one of the questions mainly

contested at the trial, the whole course of which shows that the defendants were conceding negligence if the plaintiff succeeded in proving to the satisfaction of the jury that this warning had not been given. I agree that when the jury have been misdirected in fact, or have been insufficiently instructed, the Court may in its discretion grant a new trial, even though no objection has been taken to the charge, if it appears that injustice has been or may have been done. But it is as a matter of discretion only that the Court will interfere in such a case, for the rule that the Judge's attention must be called to the alleged misdirection in order that he may correct it if he thinks proper, is strict, and is not broken in upon lightly, nor unless, as I have said, there is evident danger that a miscarriage of justice may otherwise occur. The objection now under consideration was raised for the first time by Mr. Wells in his able argument before us. It was not suggested in the Divisional Court nor even in the reasons of appeal.

Judgment.

OSLER,
J.A.

I do not think it necessary to allude to the other acts of negligence relied on in the judgment below. They might be found extremely formidable by the defendants were we to grant them a new trial, but the jury at the trial now in question did not pass upon them nor were they then raised or submitted. See *Davey v. London and South Western R. W. Co.*, 12 Q. B. D. 70, per Bowen, L. J., at p. 76. Nor is it necessary to determine whether, as Mr. Myers suggested, the defendants were under the circumstances trespassers in crossing the highways with their tracks other than the double or single through line of rails. I express no opinion favourable to that contention, but thrown out as it was on the argument for the first time, and being wholly unnecessary for the decision of the case I think it would be wrong at this stage to deal with it. On the other question, viz., whether the plaintiff was guilty of contributory negligence, I think there was ample evidence to justify the finding of the jury that she was not. She was about to cross a net-work of tracks. She was

Judgment. looking out and knew that trains might cross the road. A
OSLER, train was in fact crossing on one of the tracks just a few feet
J.A. in front of her, which naturally attracted her attention for the moment, and in the meantime another engine came up and struck her. It was for the jury to say whether under all the circumstances it was contributory negligence not to have noticed the approach of this other engine, which was being moved without sufficient warning, and the noise of which might have been and no doubt was to some extent deadened by the noise of the other train, and other noises and distractions incidental to a railway yard. It is enough to say that there was some evidence of all this for the jury, but I must add after reading the evidence that I should probably have found in the same way.

I think the appeal should be dismissed.

BURTON, J. A.:—

If the accident to the plaintiff had occurred on the line of the railway proper in its transit from one terminus to another I think no reasonable objection could have been taken to the charge of the learned Judge to the jury; but occurring as it did on one of the switches which had been placed upon the highway for the purpose of shunting, in fact made part of their station yard, I think section 256 has no application and the case has been disposed of on a wrong or immaterial issue, and that the verdict cannot be upheld, and that there ought to be a new trial if the defendants desire.

I am of opinion that that section is in effect a regulation or restriction imposed by the Legislature on the company in the running of their trains and could never have been intended to apply to a user of the highway under circumstances like the present.

If so, it was wrong on the part of the learned Judge to place the question of negligence on the omission of the statutory requirement to ring the bell. What might be a very proper standard of negligence, and which is expressly

made so by statute in reference to the running of trains, would not necessarily be evidence of negligence in the moving of trains in the yard of the company. It is not in my opinion a statutory requirement in such a case, and the omission to ring it ought not I think to have been so treated. The ringing might, if left to the judgment of the jury as a prudent or imprudent thing to do, and not as a statutory requirement, be considered by them as a thing calculated to confuse rather than to warn a person of danger in a crowded yard, with perhaps a dozen bells or whistles sounding at the same time; or again whilst proper in itself, not be considered as sufficient under such circumstances as are disclosed in this case, where more than ordinary precautions might be deemed necessary. The whole question of whether under all the circumstances sufficient care was exercised by the defendants was for the jury and not whether or not the bell was rung.

The jury on the charge if they believed the plaintiff's witnesses had no alternative but to find the defendants guilty of negligence. What conclusion they might have come to if they had been told that that was not necessarily evidence of negligence one cannot tell; but if I am right in my view that the statutory provision has no application there has been a mistrial.

It is sometimes said that unless there has been actual misdirection the Court ought not to interfere. I think that is too broad a statement and ought not to be laid down as a hard and fast rule. In a recent case in the Court of Appeal in England, *Blair v. Cox* (unreported), the Master of the Rolls, in granting a new trial where the jury had given very small damages, said: "In my opinion the learned Judge, though perhaps there had been no actual misdirection, failed to give the jury such assistance as they ought to have had to enable them to give a proper verdict." I think that is the case here and that the defendants are entitled to a new trial.

I believe my learned brothers are of opinion that as the objection was not taken at the trial it should not be urged

Judgment.

BURTON,
J.A.

Judgment.

BURTON,
J.A.

now; but there is no dispute about the facts except as to the non-ringing of the bell. We have the highest authority, that of the Privy Council, that where the question is as here a pure question of law, it is not only competent but expedient to entertain it though raised here for the first time although it may affect the question of costs.

Whether it would be worth while to take a new trial, or to take the matter further, if my views of their rights to have these tracks, other than those of the line of the railway itself, upon the highway at all is a matter for their consideration; but as the question is a very serious one I proceed to give my reasons for holding that their engine was not lawfully on the highway.

The power to cross the highways in the line of the railway between its *termini*, would necessarily have been implied (even if not expressly given) as indispensable to the accomplishment of the general purposes of the company's charter, and without any restriction, unless to be found in the Act.

The power to take the line of the railway along a street always required the assent of the municipal authority. In both cases it is now necessary to obtain the consent of the railway committee of the Privy Council, but in one case as well as the other it applies only to the line of the railway. It was said on the argument that in practice it has always been usual thus to use the highway, but that cannot make it legal unless the statute authorizes it. It is an instance of what an eminent English Judge once spoke of as law taken for granted.

I have already pointed out that section 21 of the Ontario Act [R. S. O. (1877), ch. 165], under which this railway was constructed, is confined expressly to allowing it on the line of the railway, and section 12 of the Dominion Act (R. S. C. ch. 109) uses the same language; and sub-section 2 of the same section shews further that the actual line is intended. Section 25 sub-section 7 is also confined to the line proper—it is to be found under the heading, “working of the railway.”

It is not easy to find authority on the subject, but I find an American court expressing itself much in the same terms as I did upon the argument.

Judgment.
BURTON,
J.A.

"We think" the learned Judge delivering the judgment says, "the provisions of the statute were intended to give the railroad companies the right to use the highway for passage over the same with their cars and engines, but that it was not intended to confer on such companies the right to use such highways for depôt purposes of any kind. Such use would be inconsistent with the rights of the public to their use as highways, and in the absence of any express provision of law conferring that right no presumption ought to be indulged in which would justify such use": *Russian v. Milwaukee, etc., R. W. Co.*, 10 Am. & Eng. Ry. Cas. 716.

I think the power to cross is and properly should be strictly confined to the single or double track of the line itself. This is manifest when one refers to the clauses compelling the railway to fence, and the precautions directed when the obligation to fence is dispensed with.

If such words could be held to authorize the company to convert the highway into a station yard, with any number of side tracks for shunting, we should have expected them to do so in express terms. There is no necessity for such a user of the highway. The company can always acquire land for the purpose where there would be no reason to interfere with the highway, and I cannot say that I entertain any doubt that such a user of the highway is wholly unauthorized and illegal.

It would be a curious result if the railway company were compelled to carry the lines over or under the highway, and yet they could without restriction occupy the highway for a station yard.

It was said in argument that the railway committee are constantly sanctioning the occupation of the highway in this way. If so, I am compelled to say, with great submission, that they are exceeding their jurisdiction.

The powers of the committee are defined by the Act and

Judgment.

BURTON,
J. A.

are intended to restrict the right formerly possessed by the companies to cross highways at a level; and to compel them to protect such highway either by a watchman or by a watchman and gates or other protection; or to carry such highway either over or under the railway, either by a bridge or arch or to take such other measures as under the circumstances of the case appear to them best adapted for removing or diminishing the danger arising from the then position of the railway—all measures in the interest of the public and to secure their safety—and for that purpose a plan or profile of the line proposed to be taken over the highway is to be submitted to them for their approval. But they have no power to sanction something which the Legislature has not authorized, such as taking a portion of the highway for the purpose of a station yard.

If there were eight or ten tracks on the line of the railway at this crossing I do not doubt that the committee would interpose and prohibit their crossing on a level; and I can scarcely believe that if this particular user of the highway was within the jurisdiction of the committee they would sanction it.

If then I am right in my construction of the Act that it deals only with the portion of the line of railway used by the public for travel or transportation in crossing the highway at a level, it follows that the company were, without legislative authority, using a dangerous machine upon the highway where the plaintiff rightfully was, and are liable for damages sustained. I gathered on the argument that the company's counsel did not acquiesce in my view of the law. Whilst I think there has been a mistrial I repeat that they should consider whether anything is to be gained by a new trial if this view be correct.

MACLENNAN, J. A.:—

I agree in the judgment of my brother OSLER.

Appeal dismissed with costs,
BURTON, J. A., *dissenting.*

DEVINS V. ROYAL TEMPLARS OF TEMPERANCE.

Insurance—Life insurance—Benevolent society—Initiation ceremony—Condition precedent.

Where the constitution of a benevolent society provides that beneficiary certificates may be granted to persons who take a certain degree, all the steps laid down in the constitution in connection with the taking of that degree must be complied with before any beneficiary certificate can be legally issued.

Where, therefore, the holder of a certificate, though in all other respects duly qualified and accepted as a member of the degree in question, dies before actually going through the ceremony of initiation, the certificate is not enforceable.

Judgment of STREET, J., affirmed.

THIS was an appeal by the plaintiff from the judgment of the Chancery Division affirming the judgment of STREET, J. Statement.

The action was tried at Toronto, in March, 1891, and the following judgment, in which the facts are stated, was given in favour of the defendants at the conclusion of the evidence and arguments:—

STREET, J.:—

This is an action brought by the widow of the late Nathan C. Devins against the Royal Templars of Temperance to recover the amount of a beneficiary certificate for two thousand dollars. The question to be decided is one of law altogether, and its solution depends mainly, if not entirely, upon the meaning of certain parts of the constitution and rules of the defendant society. There are two degrees, so called, of members or membership in the defendant society,—the first was called the royal degree, and the higher one was called the select degree. Under article 3, section 3, select templars are defined as consisting of all members, male and female, above the age of sixteen years, who, having petitioned for admission to the select degree, have passed a successful medical examination, and have been elected and raised to that degree; and the question here really seems to resolve itself into this, whether the deceased, Nathan C. Devins, had or had not been raised

Judgment
STREET, J.

to the select degree? The course of proceeding, under the rules, seems to be this: A person was first of all required to become a member of the royal degree; then, if he desired to do so, he might be raised to the select degree. No person could hold a policy of insurance, called a beneficiary certificate, unless he belonged to the select degree; and no person could belong to the select degree who did not hold a policy of insurance; therefore, persons belonging to the royal degree who desired to get a policy of insurance had, first of all, to apply to be admitted into the select degree; then the application was balloted upon by the other members of the degree to which they all belonged; if the ballot was in favour of the admission of the applicant into the select degree, then he applied to be examined by the medical examiner of the court; if the medical examination proved to be satisfactory, the application and report were forwarded to the council of the head body in Hamilton—the head council or grand or dominion council it is called in the rules—to be approved of or rejected by them; with that was forwarded the application for a policy of insurance, which the applicant desired to have, because the amounts varied. If the grand or dominion council passed the application they drew a policy and forwarded it to the local body, that is to say, they sent it to the beneficiary secretary of the local court. Then, under section 5, it is provided: “The beneficiary secretary shall keep a correct record of the proceedings of all degree meetings, draw and attest all orders upon the select treasurer, advise applicants of issue of certificate and date for conferring degree or of rejection, and return with it the fee,” so that it appears that something more was necessary, something had to be done in order that the member might be raised to the select degree, beyond merely his election and approval by the medical board; it appears that he had to receive his degree. The same thing appears under section 4: “Whenever the beneficiary secretary has received the certificate of an applicant, or has been officially notified that it has been granted, he

shall advise the applicant to appear and receive the degree." The same thing appears in section 3, where provision is made for conferring the degree. Well, the policy was forwarded from the grand council, with a note in print, on the back of it: "This certificate does not go into force until it has been signed by the council, sealed with the council seal, and the applicant has been raised to the select degree, and has signified his acceptance by signing the certificate." The one important question, as I have already said, is whether everything has been done to raise the applicant here to the select degree. He applied for admission and was initiated into the royal degree; then he applied for admission into the select degree, was balloted for, and the ballot was in his favour; he applied for examination, and was examined and passed by the medical officer of the local court, and was approved by the medical officer of the dominion council; and a policy in favour of Nathan C. Devins was forwarded to the beneficiary secretary of the local court along with two others. Notice was issued or sent to the deceased, with the other two, to attend on the following Monday evening to receive his degree, the select degree; but the beneficiary secretary, being informed that the applicant, Devins, was ill at the time, said it was of no consequence, his attendance; however, he was too ill, at all events, on the Monday evening to attend, and did not attend; the others did attend, and the select degree was conferred upon them. It appears there was a well understood ceremony by which the select degree was conferred; there was what they call a ritual which was read, and it was a ceremony which required the personal attendance of the person upon whom it was to be conferred. Devins did not attend, as I have said, that night, but his policy was handed to his father-in-law, who was one of the persons upon whom the select degree was conferred that night; it was taken to Devins, and he signed the acceptance of it; he died in two days afterwards, never having been able to be out to receive the select degree. The constitution and rules are drawn in a

Judgment.

SECRET, J.

Judgment. remarkably loose, careless and indefinite way, so that it is not at all easy to gather in any one place, that this ceremony of conferring the degree was actually one of the conditions to the raising of the brother to the select degree; but I think that it plainly appears from all the rules taken together; it appears with a reasonable degree of certainty that it was a necessary formality. It was a formality which, undoubtedly, the company had a right to stipulate for; they had the right to say, if they chose to do so, that the policy should not go into force, unless the applicant should attend at a particular time and place and go through a particular ceremony, and that if he did not do so the policy should not go into effect. That further appears to have been the intention from section 4, which says: "Should the applicant fail to appear for the space of three months after such notice is given without a reasonable excuse, the fee shall be forfeited to the degree treasury, and a new election and medical examination will become necessary for admission." It is indeed pointed out that under section 1, article 18, it is provided: "No member of the order shall be raised to, or remain in connection with, the select degree unless he holds an unforfeited beneficiary certificate with the dominion council, and is in good standing in the royal degree of the council." I think that cannot be taken to mean that he can hold it, and take the benefit of it, before he has actually been raised to the select degree, because it appears from section 3, in addition to the sections I have already referred to, that the assessments are not payable under the policy at all until the degree has actually been received; and it is evident that until the assessments are paid the policy does not go into effect; so that I think, under the rules, it was requisite that the deceased should appear and receive the degree before he became entitled to any benefit under the policy, and that not having done so the policy never went into effect—never went into force. In order that there may be no question upon the point, and to show the construction of the rules which I think was the correct one,

the dominion council, in issuing the certificate, put also this note on the back of it—that was a condition that they imposed precedent to the policy going into effect—and as the applicant never was raised to the select degree, I think the policy was never anything but an escrow, although it came into his hands. It was urged, on the part of the plaintiff, that the defendants, by retaining some of the fees which were paid, must be taken to have waived any further objection to the right of the representatives of the deceased to recover. It is evident, however, that the fees were retained by a mistake, and that the dominion council, who were the only persons who could waive anything of the kind, had from the very beginning determined to dispute any liability, and had waived nothing; the secretary or treasurer, who retained the money, never passed it through the books, but retained it in a drawer; and he himself could not, even if he had attempted or professed to do so, waive the condition imposed by the dominion council; he never intended to waive them, the dominion council always intended to insist upon it; so the retention of the money cannot, in my opinion, have any effect upon it. The point was discussed in the Queen's Bench Division, in *Wells v. Independent Order of Foresters*, 17 O. R. 317; the decision there seems to apply to this case. I think, therefore, the action should be dismissed, with costs.

Judgment.

STREET, J.

This judgment was affirmed by the Divisional Court (FERGUSON and MEREDITH, JJ.), on the 5th of September, 1891, FERGUSON, J., agreeing with STREET, J., and MEREDITH, J., taking the opposite view of the construction of the rules.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 30th of May, 1892.

W. Cassels, Q. C., for the appellant.

E. Martin, Q. C., for the respondents.

Judgment.

OSLER,
J.A.

I can see no authority in the rules for the delivery of the certificate by the officer except in the course prescribed by the rules. No doubt article XVIII., section 1, standing by itself, gives colour to the argument that the holding of a beneficiary certificate is a condition precedent to being raised to the select degree, but reading all the rules together which bear upon the subject, I think it impossible to give full effect to the language of that rule without disregarding the plain requirements of the others which shew that the contract is complete only when the select degree has been conferred or received, by which I understand the applicant being raised to that degree.

The appeal must therefore be dismissed. The defendants, however, have framed their rules so loosely that they are really to a great extent responsible for the litigation which has arisen, and I am of opinion that there should be no costs of the appeal.

HAGARTY, C. J. O., and MACLENNAN, J. A., concurred.

Appeal dismissed without costs.

HUMPHREY V. ARCHIBALD ET AL.

Evidence—Discovery—Malicious prosecution—Police officer—Privilege.

In an action for malicious prosecution against a police officer, arising out of a public prosecution initiated on an information sworn by him, he is not bound on an examination for discovery to give the name of the person from whom the facts were obtained.

Judgment of the Chancery Division, 21 O. R. 553, reversed.

THIS was an appeal by the defendants from the judgment of the Chancery Division, reported 21 O. R. 553. Statement.

The action was brought by one Thomas Humphrey against David Archibald, staff inspector of police of the city of Toronto, and Charles Slemin and Walter Duncan, detectives and police officers, to recover damages for false arrest and malicious prosecution. The plaintiff was arrested by Slemin and Duncan, on a charge of rape, under an information sworn to by Archibald, but was discharged by the police magistrate. On the examination of the defendants Archibald and Slemin for discovery they refused to give the names of the persons from whom they obtained the information on which the charge was based, and a motion by the plaintiff to the Master in Chambers to compel them to attend at their own expense, and submit to be examined and to disclose on oath the names of the parties, was dismissed with costs, his order being affirmed on appeal by FERGUSON, J. This order was reversed, however, by the Divisional Court and the defendants appealed, the appeal being argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 18th of November, 1892.

J. R. Cartwright, Q. C., and H. M. Mowat, for the appellants. Public policy requires that communications made to a police or peace officer should be protected from disclosure. Information is obtained by them as a rule secretly, and is often given on condition that the informant's name will not be made public, and if disclosure may be com-

Argument. pelled very serious difficulty will be thrown in the way of the detection of crime. The exception to the rule is pointed out in *Rex v. Richardson*, 3 F. & F. 693, namely, that disclosure will be compelled if it is necessary in order to protect the life and liberty of a possibly innocent person, but no case can be found where in an action for malicious prosecution, which affects only the reputation of the plaintiff, disclosure has been ordered or even allowed. It certainly should not be directed upon a preliminary examination for discovery. The information it is true may be useful and important to the plaintiff, but it is more useful and important for the ends of justice to protect persons who give information of supposed crime: *Rex v. Hardy*, 24 How. St. Tr. at col. 811; *Rex v. Watson*, 32 How. St. Tr. at col. 100; *Attorney-General v. Briant*, 15 M. & W. 169; *Marks v. Beyfus*, 25 Q. B. D. 494; *Hennessey v. Wright*, 21 Q. B. D. 509.

W. R. Smyth, for the respondent. This is an action for malicious prosecution, and in order that the plaintiff may succeed, he must prove affirmatively, not only that he is not guilty of the offence for which he was prosecuted, but also that there was no reasonable and probable cause for his arrest or prosecution. The absence of reasonable and probable cause is the very essence of the action. This can only be shewn from the defendants by learning from them the cause they had for the arrest and prosecution. Now, when these defendants are asked this cause, they say, "Some person told me." When they are asked who that person is they decline to answer, and seek to shield themselves by claiming an alleged privilege to refuse to answer. If it be decided that they are entitled to this privilege, then the plaintiff cannot compel an answer, and therefore can not show that they acted without reasonable and probable cause, and there is an end to his action. It has, it is submitted, never been the law that communications made to a police officer are absolutely privileged from disclosure, and it would be most unsafe were such to be the rule in actions for malicious

prosecution. As will easily be seen, the result of establishing such a privilege would be to place the reputation of every citizen at the mercy of every ordinary police officer and constable, for a man could be arrested and his reputation destroyed and yet he would be unable, owing to this privilege, in an action against the policeman to show the absence of any reasonable ground for arresting him. Police officers are sufficiently protected now, inasmuch as the plaintiff is, in an action of this kind, obliged to prove affirmatively absence of reasonable and probable cause, and it would be granting them an entire immunity from punishment for wrongdoing, if the privilege contended for were upheld. The cases cited are cases of disclosure being asked from a witness. Where the officer is a party to the action the privilege does not exist: *Freeman v. Arkell*, 1 C. & P. at p. 137; *Lee v. Birrell*, 3 Camp. 337; *Wheeler v. LeMarchant*, 17 Ch. D. 675; *Webb v. Catchlove*, 82 L. T. J. 103; *McFadzen v. Mayor of Liverpool*, L. R. 3 Exch. 279; *Blake v. Pilfold*, 1 M. & Rob. 198.

J. R. Cartwright, Q. C., in reply.

March 7th, 1893. BURTON, J. A. :—

It is unnecessary to decide in this case whether if this question had arisen upon the trial the learned Judge would have been at liberty to exercise a discretion; it will be time enough to pronounce upon that when it arises.

Here the question was put, and the defendant refused to give the name of his informant upon an examination for discovery.

A good deal of confusion, I think, arises from treating the refusal as the privilege of the witness whereas it is not so, but is adopted on the grounds of public policy on account of its importance to the public. "It is observed by Courts of Justice on a principle of public policy and from regard to public interest."

We have no such thing in this country as private prosecutions for crimes of the nature charged in this case.

Argument

Judgment.

BURTON,
J.A.

Mr. Phillips, I think, in his work (Vol. 1, p. 133,) correctly lays down the rule thus: "The discovery of truth in inquiries necessary for the administration of criminal justice * * may nevertheless be counterbalanced by serious inconveniences from disclosures prejudicial to public interests, and the danger of such disclosures has been deemed, in particular instances, an adequate ground for the exclusion of evidence. Witnesses are not to be examined respecting information given by them to Government for the discovery of offenders against the law. The names of persons who are the channels by which detection is made are not to be disclosed."

The only exception to that rule which I can find, is that if upon *the trial of the prisoner* the Judge should be of opinion that the disclosure of the name of the informant is necessary in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy which must prevail. But except in that case this rule of public policy is not a matter of discretion.

It is a rule of law and as such should be applied by the Judge at the trial who should not treat it as a matter of discretion whether he should tell the witness to answer or not.

And Lord Esher in *Marks v. Beyfus*, 25 Q. B. D. 494, at p. 499, says that "The rule as to nondisclosure of informers, applies, in my opinion, not only to the trial of the prisoner, but also to a subsequent civil action between the parties on the ground that the criminal prosecution was maliciously instituted or brought about."

I do not think that *Regina v. Richardson*, 3 F. & F. 693, is any exception to this rule. But if it is a matter of discretion it is one to be exercised by the learned Judge at the trial and not on an examination for discovery, and I am of opinion therefore that the order of Mr. Justice Ferguson was correct and should be restored.

OSLER, J. A. :—

Judgment.

OSLER,
J.A.

I am unable to suggest a reason, looking at our system of administering the criminal law of this country, for holding that the prosecution out of which this action has arisen was not a public prosecution. If it was a public prosecution the cases of *Attorney-General v. Briant*, 15 M. & W. 169, and *Marks v. Beyfus*, 25 Q. B. D. 494, shew that the communications made to the police officer who was the prosecutor are protected from disclosure.

In the case of *Worthington v. Scribner*, 109 Mass. 487, an action substantially similar to the present, the same rule was laid down and enforced upon a full examination of English authority.

With all deference to the Court below therefore, I am obliged to concur in allowing the appeal.

HAGARTY, C. J. O., and MACLENNAN, J. A., concurred.

Appeal allowed with costs.

MITCHELL V. McCAULEY.

Landlord and tenant—Rent—Acceleration of payment on issue of execution—Execution—Distress—Severance of reversion.

A condition in a lease that in case any writ of execution should be issued against the goods of the lessee the then current year's rent should immediately become due and payable, and the term forfeited is personal to the original lessor and lessee and does not run with the land, and cannot be taken advantage of by the grantee of part of the reversion.

OSLER, J. A., [dissenting] was of opinion that the acceleration clause was a covenant and not a condition, and formed part of the covenant to pay rent, merely accelerating it in a certain event, and so passed on the severance of the reversion enabling the grantee of part to distrain. Judgment of ARMOUR, C. J., in the Divisional Court, affirmed.

Statement.

THIS was an appeal by the defendant from the judgment of the Queen's Bench Division.

The action was brought to recover damages for illegal distress. The lease under which the question arose, was made by one John McCauley to the plaintiff on the 19th of March, 1886, of lot 25 in the 2nd concession of the township of Rochester, for five years, in consideration of a rental of \$200 per annum payable in two equal payments, of \$100 each, the one payable in advance on the 19th of March and the other on the 18th of March in each year. It contained a covenant by the lessee for himself, his heirs, executors, administrators and assigns, with the lessor, his heirs and assigns, to pay the rent at the days and times and in the manner mentioned, and also a provision that "in case any writ or warrant of execution shall be issued against the goods or chattels of the said lessee * * the then current year's rent shall immediately become due and payable, and the said term shall immediately become forfeited and void." On the 29th of November, 1886, John McCauley conveyed to the defendant the east half of this lot and to one John Wilcox the west half. By agreement between Wilcox and the defendant the rent was apportioned, \$110 to the defendant, and \$90 to Wilcox.

The distress warrant in question was issued on the 17th of September, 1890, and the distress in question was made

on the 27th of September, 1890. The warrant directed a levy of "\$55, being the amount of one-half year's rent * * due under the lease when a warrant of execution was issued against the goods and chattels of Jacob Mitchell." The instalment of rent due on the 19th of March, 1890, had been paid so that except under the acceleration clause no sum would have been payable until the 18th of March, 1891. On the 18th of August, 1890, an execution issued out of the 8th Division Court of the county of Essex in an action by Richardson & Bro. against the plaintiff. The bailiff notified the plaintiff of this fact a few days before the 12th of September, and the money was paid to the bailiff before the 12th of September, and the execution was returned with the money by the bailiff on the 12th of September. There was some evidence that the plaintiff had agreed to the apportionment of rent between the defendant and Wilcox, and that the rent had been paid by him to them in accordance with this arrangement. There was also some evidence that the defendant had given some information to Richardson & Bro. as to the financial position of the plaintiff which had induced them to bring the action in the Division Court referred to.

The action was tried at Chatham, on the 28th of April, 1891, before FALCONBRIDGE, J., who found that the defendant had induced Richardson & Bro., to obtain the judgment against the plaintiff; that it had been paid before the distress; that under these circumstances the defendant could not treat the issue of the execution as accelerating the payment of the rent; that there was therefore no rent due at the time of the distress, and he assessed the damages at \$10.00, and entered judgment for the plaintiff with full costs. On motion to the Divisional Court, this judgment was affirmed, the Judges being divided in opinion. ARMOUR, C. J., thought that the benefit of a condition or stipulation, such as that contained in the lease in question, did not pass to the grantee of part of the reversion; that at the time of the distress the rent was payable solely by virtue of the condition, and that therefore the distress was illegal.

Statement. STREET, J., on the other hand, thought that it was the fault of the plaintiff himself, and not any act of the defendant, to which the recovery of the judgment by Richardson & Bro. should be ascribed; that the stipulation in the lease was not illegal, and should be given effect to; that the right to claim the accelerated rent arose as soon as the warrant of execution was issued; that on the evidence, the rent had been duly apportioned with the consent of the tenant; and that the accelerating provision was divisible and ran with the reversion, amounting to a stipulation in the nature of a covenant that the rent would be paid at the accelerated date in the event of a judgment being recovered.

The defendant appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 21st of November, 1892.

Aylesworth, Q. C., for the appellant. Upon the severance of the reversion created by the sale and conveyance by John McCauley, the lessor, to the defendant, of the east half of the lot, the defendant became entitled to his proper proportion of the rent reserved under the lease, and to all such remedies by distress or otherwise for the collection of his portion of the rent as the original lessor had for the collection of the entire rent; the rent being incident to and running with the reversion: *Hare v. Proudfoot*, 6 O. S. 617; *Parker v. Webb*, 3 Salk. 5; *Rivis v. Watson*, 5 M. & W. 255. The rent was legally apportioned between the defendant and John Wilcox, the purchaser of the remaining portion of the leased estate, at the time of the conveyance to the defendant, and the plaintiff was immediately notified of the apportionment and acquiesced in it, and cannot now object: *Bliss v. Collins*, 4 Madd. 229; 5 B. & Ald. 876; *Rivis v. Watson*, 5 M. & W. 255; *Hare v. Proudfoot*, 6 O. S. 617; *Bickle v. Beatty*, 17 U. C. R. 465; *Reeve v. Thompson*, 14 O. R. 499. The defendant's share of the instalment of rent payable on the 18th March, 1891, became due by virtue of

the provision in the lease accelerating the payment of rent and this rent remaining unpaid, and the defendant not having elected to forfeit the term, he had the legal right to distrain: *Parker v. Webb*, 3 Salk. 5; *Doe Somers et al. v. Bullen*, 5 U. C. R. 369; *Young v. Smith*, 29 C. P. 109; *Linton v. Imperial Hotel Co.*, 16 A. R. 337. The accelerated rent under this lease was payable as rent reserved; the provision for acceleration of payment being in no sense a condition, but simply a covenant of the lessee which should be read as part of the covenant for the payment of rent under the lease, and as qualifying the time fixed for payment of the rent reserved by the lease. The trial Judge erred in holding that the defendant was responsible for the acceleration of the rent, and was in consequence disentitled to take advantage of the acceleration clause: *Davis v. Eyton*, 7 Bing. 154. The circumstance that the execution was paid before the issue of the distress warrant does not take away the right to distrain. By the express terms of the plaintiff's covenant the rent in question became immediately due and payable on the issue of the warrant of execution against him and the rent so becoming due and payable, nothing which might afterwards happen could render it less due or make it become not yet payable.

Douglas, Q. C., for the respondent. The finding of the trial Judge was that the defendant had by his fraudulent representation and conduct induced Richardson & Bro. to bring the action, and this being so the defendant cannot in any event take advantage of the condition. Moreover there was no apportionment of the rent, and there was nothing which could entitle the defendant to distrain. In this lease there was no power to distrain reserved as there was in *Linton v. Imperial Hotel Company*, 16 A. R. 337, and this sufficiently distinguishes this case from cases of that kind. The proviso relied on is too uncertain and indefinite, and unlimited as to time, place, and otherwise, to be given effect to, and, being in its na-

Argument. ture and effect penal, must be construed strictly. If the proviso is good at all the defendant could only take advantage of it at and during a time when an execution was in force against the plaintiff and then only after giving notice to him to remedy the breach as required by section 11, sub-section 1, R. S. O. ch. 143, and the moment the execution was withdrawn or satisfied, the defendant could not set it up to justify his proceedings. The condition does not run with the land, and could not, and does not, pass to the defendant. It does not touch or concern the thing demised, but at most was a personal agreement and condition merely collateral to the lease. R. S. O. ch. 143, sec. 7, does not apply to such a condition as this. It only gives to the assignee of a part of the reversion (where there has been a legal apportionment) the benefit of all the conditions or powers of entry for non-payment of the original rent. This does not give the assignee any right except of re-entry for the original rent, which means the rent as originally agreed to be paid.

Aylesworth, Q. C., in reply.

March 7th, 1893. MACLENNAN, J. A. :—

I am unable to agree with the ground upon which my learned brother Falconbridge rested his judgment at the trial. I think with great respect that the mere circumstance that the defendant's suggestions may have caused the creditors to take proceedings which they would not otherwise have done for the recovery of a lawful debt, and their having recovered judgment and issued execution, could not prevent the covenant in the lease from having its legal effect. There is nothing illegal in suggesting to a creditor that he had better look after his debt. It may be a proper friendly act, or it might be a meddlesome or spiteful act; but it is not illegal. The execution was not issued because of what the defendant said or did, but because the plaintiff omitted to pay the debt or the judgment as he ought to have done.

I am of opinion also, that the ground on which Mr. Justice Street rests his judgment fails. The circumstance that formal words of covenant are used does not make the clause in question less a condition or exclude the principles of law which are applicable to conditions. In many, perhaps in most cases of conditions, there is involved the element of agreement between the parties to the deed, and wherever that is the case, there is really a covenant. The whole subject is fully explained in Elphinstone, Norton and Clark on Deeds, pp. 410, 411, rule 151. In the present case, if no formal words of covenant had been used, and if the words had been "provided that if any writ or warrant of execution, etc," I think it is clear the effect of the deed would have been the same. It would have been an agreement on the part of the lessee that the rent should be accelerated, and therefore, being contained in a deed, a covenant to that effect on which an action could have been maintained. We have here therefore to deal with a condition, and the question is whether it is one of which the assignee of the reversion of part of the land can take advantage.

Judgment.

MACLENNAN,
J.A.

The learned Chief Justice of the Queen's Bench Division has pointed out that this case is not within the 7th section of R. S. O. ch. 143, because the condition of re-entry is not for the payment of rent, and he has held that it is not one the benefit of which would pass by 32 H. VIII. ch. 34.

The cases of *Mayor of Swansea v. Thomas*, 10 Q. B. D. 48, and *Twynam v. Pickard*, 2 B. & Ald. 105, and other cases, shew that under the above statute an assignee of the reversion of part of the land has the same right to sue as the lessor had, and also the same right to take advantage of conditions which are in their nature divisible, but not of conditions which are in their nature entire. In the latter of these cases Bayley, J., says: "The words (of the statute) therefore apply to conditions as well as to covenants, and are sufficiently large to include persons who are grantees of the reversion, either of the whole or part of the

Judgment. property, which is the subject of the lease." But he adds:
MACLENNAN, "That part, however, which applies to conditions which in
J.A. their very nature are entire, is necessarily confined to the assignees of the reversion of the whole of the premises." And Holroyd, J., at p. 112, shews, citing *Knight's Case*, 5 Rep. 55 (b), that if the lessor assigned the reversion of part of the premises to another his right of entry would be gone, for that case decided that the severance of any part of the reversion destroyed the whole condition.

We must therefore see whether this condition is entire or severable in its nature. What is the condition? It is not that the rent shall immediately become due, or that the term shall become forfeited and void, but it is the event or occurrence upon which those effects are to follow, namely, "in case any writ or warrant," etc. Wharton, Law Lexicon, 9th ed., p. 162, defines a condition as "a restraint annexed to a thing so that by the non-performance the party to it shall receive prejudice and loss, and by the performance, commodity or advantage; or it is that which is referred to an uncertain chance, which may or may not happen." In the case of a legacy, upon condition of the legatee attaining twenty-one years, the legacy is not the condition, it is the attaining of the age of twenty-one, and so in other cases. Here, therefore, the condition is the issuing of the writ or warrant of execution against the lessee. That is a condition which is clearly entire, clearly indivisible, and therefore one which is not within the statute of H. VIII. I think, therefore, that the judgment of the learned Chief Justice is correct, and that the plaintiff was rightly held entitled to recover.

There is also another ground on which I think it clear the same conclusion ought to be reached. It has been decided that the statute of H. VIII. only applies to covenants and conditions which run with the land: Smith on Landlord and Tenant, p. 386; Woodfall on Landlord and Tenant, 6th ed., p. 252; Redman and Lyon, 3rd ed., p. 333, and this condition has no relation to the land, and does not touch or concern the thing demised. It is a

matter purely personal to the lessee, and altogether collateral. In *Stevens v. Copp*, L. R. 2 Exch. 29, three learned Judges held clearly, the fourth, Kelly, C. B., doubting, that a proviso for re-entry in the event of the lessee, his executors, administrators, or assigns, etc., being convicted of any offence against the game laws did not run with the land. The case of bankruptcy to which Kelly, C. B., referred is wholly different, for by bankruptcy the term would be divested, and such a condition therefore clearly concerns the thing demised. See also *Keppel v. Bayley*, 2 M. & K. 517.

Judgment.

MACLENNAN,
J.A.

I am therefore respectfully of opinion that the judgment should be affirmed and that the appeal should be dismissed.

HAGARTY, C. J. O. :—

I agree.

BURTON, J. A. :—

I agree in the result, but I prefer to place my decision on the ground that the condition did not run with the land or touch the thing demised; that it was personal to the original lessor and his lessee, and that is not one of which the assignee of a portion of the reversion can take advantage.

OSLER, J. A. :—

There is evidence from which I think it ought to be inferred that after the severance of the reversion by the conveyances to the defendant and Wilcox, the rent reserved on the lease to the plaintiff was apportioned by the mutual assent of the defendant and the new reversioners. I attach a good deal of weight to Wilcox's evidence on this point.

I am also of opinion that, as it was the plaintiff's default in paying the judgment which Richardson & Bro. recovered against him, which led to their issuing execution on that judgment, the plaintiff cannot allege that this act upon which the defendant relies as justifying the distress in

Judgment.

OSLER,
J.A.

question was caused by or done at the instance of the defendant in order to enable him to make such distress. The defendant may have prompted Richardson & Bro. to bring the suit, and if he did, it was a shabby and unneighbourly act; but its consequences cannot be pressed further against him as the debt was due, and the plaintiff might have prevented any further injury by paying it.

Then whether the defendant had a right to {distrain:— It was conceded by Mr. Aylesworth that the judgment of Armour, C. J., was right, if he had correctly construed the clause in the lease, making the current year's rent immediately due and payable in case a writ or warrant of execution be issued against the goods and chattels of the tenant. But this covenant ought not to be severed from the other covenant arising from the reservation of the rent, but should be read with it, and as a part of and qualifying it. If it is to be read as Armour, C. J., would read it, as a separate and independent condition, I agree with him, that it would be destroyed by the severance of the reversion, and consequently that the defendant had no right to distrain. But I cannot so read it. I agree with Street, J., that it should be read in connection with the covenant for payment of the rent, and as merely accelerating it in a certain event or events; so that the benefit of it passed on the severance of this reversion to the two reversioners, and consequently that the defendant had a right to distrain as and when he did. I favour, therefore, the allowance of the appeal for the reasons set forth at length in the judgment of Street, J., and I think that our judgment in *Linton v. Imperial Hotel Co.*, 16 A. R. 337, supports that conclusion.

Appeal dismissed with costs,
OSLER, J. A., *dissenting.*

GILMOUR & CO. V. THE BAY OF QUINTE BRIDGE CO.

Negligence—Contributory negligence—Bridge—Collision.

The persons in charge of a vessel are bound when approaching at night a drawbridge, lawfully erected, to keep the vessel under complete control, and are not entitled to assume that the draw of the bridge is open or will be opened in time to let the vessel through. Therefore, if a vessel is allowed to approach so close to the bridge that collision with it cannot be avoided when the draw is found to be closed, damages are not recoverable from the bridge owners.

Judgment of the County Court of Hastings reversed, HAGARTY, C. J. O., dissenting.

THIS was an appeal by the defendants from the judgment of the County Court of Hastings. Statement.

The plaintiffs were lumber merchants, and were the owners of a vessel or batteau called "Sydney." The defendants were a company incorporated by 50 & 51 Vic. ch. 97 (D.), for the purpose of constructing, maintaining, managing, and working a bridge across the Bay of Quinte. The Act of Incorporation provided that the company might build and complete a bridge across the Bay of Quinte for ordinary traffic purposes; that the bridge should be provided with a draw or swing so constructed as to have not less than 100 feet space for the free passage of vessels, etc., which draw or swing should at all times be worked at the expense of the company so as not to hinder or delay unnecessarily the passage of any such vessels, etc.; and that during the season of navigation the company should maintain from sundown to sunrise suitable and proper lights upon the bridge to guide vessels approaching the draw or swing. The bridge was duly constructed and a bridge-keeper was in charge night and day whose duty it was to open the swing for approaching vessels on a signal being given, this being usually given either by steam whistle or by foghorn. The company, as authorised by the Marine Department, kept burning at night two white lights and two red lights when the swing was closed, and two white lights and two green lights when the swing

Statement. was open. The batteau in question, loaded with lumber, approached the bridge about three o'clock on the morning of the 19th July, 1891, sailing before the wind, intending to pass the bridge. The night was dark and misty, and the captain, who was in charge of the vessel, stated in his evidence that although he saw the white lights of the bridge when about two miles away he did not see the red lights or the green lights at all. It was shewn, however, that these lights were burning at the time of the accident in question and that the red lights were then displayed showing that the draw was closed. The captain was well acquainted with the locality in question and with the regulations as to the lights. The captain also stated that he gave the usual signal several times before approaching the bridge, but he did not take any steps to check the speed of his vessel, and when he came close enough to the bridge to see that the draw was not open, he was unable to stop her, and she ran into the bridge and was considerably damaged. It was admitted that the bridge-keeper was not at his post at the time of the accident. He stated in his evidence that he had left the bridge only a few minutes before the accident occurred, and that he had looked carefully for vessels and had not seen any vessel approaching. It was proved that it took about five minutes to open the swing. There was much contradictory evidence as to the nature of the lights that were burning on the vessel, and the nature of the lookout that was being kept, and also as to the signals that were given.

The action was tried at Belleville, on the 14th of June, 1892, when judgment was given in favour of the plaintiffs for \$130.00 and costs.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 19th of January, 1893.

Aylesworth, Q. C., and W. H. Biggar, for the appellants.
The real cause of the accident in question was the negli-

gence of the captain in not keeping his vessel under control and in not allowing himself space to stop when he found the draw was closed. It was his duty to use extreme care in approaching a bridge having an opening of only 100 feet through which his vessel had to pass. The vessel herself was not provided with a proper foghorn or proper lights, and had she displayed proper lights the bridge-keeper would have seen her and would have opened the swing. Even if the bridge-keeper had been on the bridge, it would have taken him at least five minutes to open the swing as the captain knew, and the captain therefore should not in any event have approached so close without waiting to see that everything was ready for the vessel's passage. The absence of the bridge-keeper was in no sense the cause of the accident, and was not such negligence as entitled the plaintiffs to recover. There was no statutory duty imposed on the defendants to have a man stationed on the bridge. They kept the man there simply to prevent as far as possible any unnecessary delay to navigation.

Clute, Q. C., for the respondents. The absence of the bridge-keeper was the cause of the accident. Had he been there, and the captain was entitled to assume that he would as usual be there, the draw could have been opened in time. The Judge has found in favour of the plaintiffs on conflicting evidence, and his decision should not be interfered with.

Aylesworth, Q. C., in reply.

March 7th, 1893. BURTON, J. A. :—

The learned Judge does not appear to have given sufficient weight to the fact that the defendants were not in the position of wrongdoers in having their bridge closed. They had statutory authority not only for the construction of their bridge but to keep the draw closed for the convenience of travellers requiring to use it, the obligation imposed upon the company being to work the draw at all times at their own expense, so as not to hinder or delay

Judgment.
BURTON,
J.A.

unnecessarily the passage of vessels, coupled with the further obligation to maintain from sundown to sunrise suitable and proper lights upon the said bridge to guide vessels approaching.

It is not necessary in my opinion to enquire whether the plaintiffs were guilty of what was spoken of on the argument as contributory negligence, although not accurately so described on the facts of this case, but the evidence, to my mind, makes out a very strong case of negligence on their part; in other words that the plaintiffs were the authors of their own loss; but I place my decision entirely upon this, that there was no evidence proper to submit to a jury of any negligence on the part of the defendants directly causing the accident, or proximately contributing to it. It is frankly conceded by the man in charge that he was absent from his post at the time of the accident, and if the plaintiffs suffered any loss by that very trifling delay in the passage of the vessel, no doubt the company would be liable. But the *causa sine quâ non* of an accident is not that on which depends the legal imputability of the accident; the liability depends not on that but on the *causa efficiens*.

Here there was no question for the jury; the fact of the only act of negligence imputable to the company is admitted; the only point is, if the inference from this admitted fact cannot, on the hypothesis most favourable for the plaintiffs, show that the damage was the direct or proximate cause of that act, the Judge should withdraw the case from the jury.

Walker v. Goe, 3 H. & N. 395, is an illustration of what I wish to convey. There an Act enabling commissioners of a navigation company to grant a lease of a canal contained a clause to the effect that if the lessees should permit the navigation to be out of repair, the commissioners were authorized and required to give notice thereof to the lessees to make the repairs, and in default the commissioners were authorized to make them at the expense of the lessees.

During the lease one of the locks became out of repair ; but the commissioners, though they knew of it, gave no notice to the lessees. A barge entered, and was injured by the falling in of the lock, and an action was brought against the commissioners for this neglect of duty. But the Court in giving judgment said : "To say that the damage could be the consequence of the wrongful act or omission is, in our judgment, to assert a false proposition of law. The surmise is, if the notice had been given, the repairs would have been done, and the lock would not have fallen in ; and so not giving notice, caused the lock to fall in * * . But it is not the proximate, necessary or natural result of not giving notice. The not giving of notice is not sufficient to bring about the result ; the giving of it would not be sufficient to hinder it."

Judgment.

BURTON,
J.A.

Here the plaintiffs had no right to assume that if the watchman had been at his post he could at once open the draw. There might have been a string of carriages passing, or a number of matters might have happened to prevent an immediate compliance, and under any circumstances at least five minutes would have been occupied in opening it. There was a duty, on the other hand, imposed upon the plaintiffs to ascertain whether the draw was open, a duty they were not at liberty to disregard ; and I have no doubt that if they had injured the bridge, the absence of the watchman would have been no answer. That would have been within *Radley v. London & North-Western R. W. Co.*, 1 App. Cas. 754, but that case has, I think, no application to the present action.

There was no statutory obligation to have a watchman there at all. It was a mere precaution, as the company might have been liable to constant actions for causing delay ; but they had complied with the statute when they placed the lights on the bridge, and it was incumbent on the plaintiffs to see whether the draw was open before they attempted to pass through. I think the plaintiffs should have been nonsuited.

Judgment. OSLER, J. A. :—

OSLER,
J.A.

The evidence in this case was very fully discussed on the argument of the appeal, and it appeared to me to establish as plain a case of contributory negligence on the part of the plaintiffs as could possibly be imagined. Perhaps such is not the accurate term to use in describing what occurred, for it was not the negligence of the defendants' officer in not opening the draw, but the negligence of the plaintiffs in running against the bridge without taking care to see that the draw was open, which caused the accident.

The negligence of the defendants might be said to have caused delay to the vessel-owners in exercising their right of navigation, but that is all; their omission to open the draw promptly did not excuse or warrant the latter in proceeding blindly with the vessel as if the draw had been open, or would certainly be opened at the moment they arrived at it. The normal state of the bridge is with the draw closed. The duty of the company is, on reasonable notice or request, to open the draw for the passage of vessels promptly and without unreasonable delay. Therefore the navigator is bound to assume that the bridge will be closed and to know that it will not be opened unless and until he gives the signal of his approach. But as he cannot know that his signal has been heard, or, if heard, that it is being immediately obeyed, since there may be causes which will result in an excusable delay, it is manifest that he has no right to proceed on his course in such a manner as must inevitably result in collision if there has been such delay or some negligent delay. His duty evidently is to have his vessel under such control, where the circumstances admit of it, as they clearly did here, as to enable him to avoid a collision with the draw where it is not being opened in time to permit of his passing through it on the course and at the rate of speed at which he is going.

The learned Judge below laid it down that the captain

had a right to assume that the draw would be opened and to go on, expecting it to open, until he got so near that it was impossible to turn his vessel, and could not do otherwise than go into the bridge. I do not think that is a proper or reasonable rule. The defendants must not unreasonably obstruct navigation. If they do, there is a proper remedy; but if the delay is unreasonable, or if from any cause the bridge is not being opened, the navigator should use due care to avoid a collision, and must not, where he can see, if he looks, that the bridge is not being opened, proceed as if the bridge would be open by the time he arrives at it, sailing on his then course and rate of speed.

Judgment.

OSLER,
J.A.

A *fortiori* is this the case where he cannot see the bridge and knows not whether his signal has been heard and whether it is being opened. Here the evidence shews that there was enough time and room for the captain so to have handled his vessel as to have avoided the collision, and the collision resulted simply from his holding on his course, taking everything for granted.

I am therefore of opinion that the appeal should be allowed. I refer to *Columbus Insurance Co. v. Peoria Bridge Association*, 6 McLean (C. C.) 70; *Walker v. Goe*, 3 H. & N. 395.

MACLENNAN, J. A. :—

I also am of opinion that the appeal should be allowed.

Section 2 of the Company's Act authorizes the defendants to build and maintain the bridge for ordinary traffic purposes. By section 3, the company were not to proceed with the erection of the bridge until the plans, site and works connected therewith were approved of by the Governor in Council; and by section 4, the bridge was to be provided with a draw or swing so constructed as to leave not less than 100 feet space for the free passage of vessels, which draw or swing was at all times to be worked at the expense of the company, so as not to hinder or delay

Judgment. unnecessarily the passage of vessels; and during the season
MACLENNAN, of navigation lights were to be maintained from sundown
J.A. to sunrise, suitable and proper to guide vessels approaching the draw or swing.

The first question which arises is upon the working of the draw or swing of the bridge. The statute requires that to be done so as not to hinder or delay unnecessarily the passage of vessels. That seems to mean that vessels are not to be hindered or delayed without necessity. Unless there be necessity there is to be no hindrance or delay at all. What then is the necessity contemplated by the Act? The purpose of the bridge was use by the public for passing over it as a highway for ordinary traffic. Therefore whenever such use made it necessary to do so, the passage of vessels might be hindered or delayed; otherwise any hindrance or delay would be, as I think, unauthorized and illegal—it is forbidden.

When this accident occurred it is not pretended that the bridge was in use by any one, and being closed it was an unnecessary hindrance to the passage of the plaintiffs' vessel; it was unauthorized and illegal.

It does not, however, follow that the defendants are liable for the damage to the plaintiffs' vessel by running against the closed draw.

The statute does not prescribe any particular kind of lights which the company are to use. All that is required is that they are to be suitable and proper to guide vessels approaching the draw. No complaint is made in the statement of claim of the want or insufficiency of lights, and it is clearly proved that there were white lights visible at a long distance, which were actually seen by this vessel, and that there were also red and green lights, but which it is said were not seen. It is settled law that although this bridge was closed at the time of the accident, and was closed unnecessarily, and therefore illegally, the plaintiffs cannot recover, if, with their eyes open, they ran against it, when by reasonable care they might have avoided doing so. I am of opinion that the captain of this

vessel might, and ought to have avoided this collision. In Judgment.
the first place, as a prudent careful mariner, it was his MACLENNAN,
duty to approach the bridge cautiously. He could not tell, J.A.
and had no right to assume, that it was not in use, or that
it might not necessarily be kept in use for some time. If
so, it might be some time before it would be opened in
answer to the blasts of his horn. He says the night was
very dark and misty. He did not suppose the bridge was
open, but the contrary. He thought it required to be
opened, and so he blew his horn several blasts, twice, with
a short interval. He knew that the bridge shewed a red
light when it was shut, and a green one when it was open.
He saw the white lights, he says, two miles off, but not
the green or the red ; although it is proved they were both
burning.

The learned Judge thinks the reason he did not see the
red light, which, the draw being closed, was the only one
which it was possible to see, is that a red light is much
less intense and penetrating than a white one. Whether
that was the reason, or whether it was due to its being hid-
den by the mainsail and rigging, it was, I think, most im-
prudent and incautious to approach the bridge until by
some means he ascertained that it was open. He knew
that the bridge was there, for he saw the white lights, and
he knew it might be shut ; nay, more, he believed it was
shut and required to be opened for him, and yet he never
paused or attempted to bring his vessel to, until it was too
late. He says if he had known the man was not there
he would have dropped his anchor, but he supposed he
was there.

The learned Judge says the captain had a right to
assume that the draw would be opened. I think all he
had a right to assume was that the draw would not be un-
necessarily closed. But he did not assume that it was
open, and he had no right to sail recklessly on and take
the chances of its being opened or not. He says when he
was 200 or 100 yards away he did not know whether it
was open or shut.

Judgment. I think that the injury complained of was caused by the
MACLENNAN, want of reasonable care on the part of the master of the
J.A. plaintiffs' vessel, and not by the defendants' negligence.

The judgment is therefore, in my opinion, wrong, and the appeal should be allowed.

HAGARTY, C. J. O. :—

I am unable to agree in the judgments just delivered. I think that the question was one for the determination of the Judge, who has come to a certain conclusion on contradictory evidence, and I do not think that that conclusion should be disturbed. In my view it is unnecessary to consider in connection with this case the general law of negligence or contributory negligence.

Appeal allowed with costs,
HAGARTY, C. J. O., *dissenting.*

CRAIN ET AL. V. RAPPLE.

Specific performance—Sale of land—Partners—Abatement.

Where a contract is made by one partner for the sale of partnership lands, to which the other partner refuses to consent, the purchaser cannot insist upon taking the share in the lands of the contracting partner with a proportionate abatement in the price.

Judgment of the Common Pleas Division, 22 O. R. 519, reversed.

THIS was an appeal by the plaintiffs from the judgment of the Common Pleas Division, reported 22 O. R. 519. Statement.

The plaintiffs, Crain & Mix, carried on business in partnership as contractors, builders and brickmakers, and brought the action for trespasses committed on certain lands. The defendant pleaded "not guilty," and leave and license, and by counter-claim asked for the specific performance of an oral contract for the sale by the plaintiffs to him of the lands in question, alleging that in pursuance of that contract he had entered into possession and had made improvements.

The action was tried at Brockville on the 10th of November, 1891, before BOYD, C. It was proved that the defendant knew that the property was partnership property and that he had made the agreement in question with the plaintiff Mix, but there was a conflict of testimony as to whether the agreement was conditional on its acceptance by the plaintiff Crain, and as to this question the Chancellor found against the plaintiffs. It was clearly shewn, however, that Crain did in fact refuse to assent to the contract and the Chancellor directed judgment to be entered for the defendant for specific performance of the contract as against Mix with costs, with an abatement of the price by one-half, and dismissed the counter-claim as against the plaintiff Crain with costs. He also dismissed the action with costs.

This judgment was affirmed by the Common Pleas Division, when the plaintiffs appealed and the appeal was

Argument. argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 23rd of January, 1893.

W. Cassels, Q. C., for the appellants. The property in question was to the knowledge of the defendant partnership property, purchased with partnership funds, and used for partnership purposes. Under such circumstances a conveyance of a moiety with an abatement will not be decreed: *Castle v. Wilkinson*, L. R. 5 Ch. 534. In all the cases to the contrary a distinction exists, viz., that the vendor was contracting to sell the whole interest and the vendee was unaware of his limited interest: *Hooper v. Smart*, L. R. 18 Eq. 683; *Horrocks v. Rigby*, 9 Ch. D. 180; *Burrow v. Scammell*, 19 Ch. D. 175. One partner cannot contract to sell the real estate of the firm. This is conceded, and the action is dismissed as against Crain. If the rule of the Court is as stated in *Castle v. Wilkinson*, in the case of co-owners, *a fortiori* must it be so in the case of a partner purporting to sell the whole of the partnership land, the purchaser being aware of his limited interest.

Watson, Q. C., for the respondent. The respondent is entitled, as he cannot get the whole land, to take the half interest with an abatement: *Parsons*, sec. 171; *Lindley*, 3rd ed., pp. 240, 720; *Treadwell v. Williams*, 9 Bosworth, 649; *Cassels v. Stewart*, 6 App. Cas. 63; *Fry*, 3rd ed., pp. 221, 567; *Barker v. Cox*, 4 Ch. D. 464; *Mortlock v. Buller*, 10 Ves. at p. 314.

W. Cassels, Q. C., in reply.

March 7th, 1893. The judgment of the Court was delivered by

MACLENNAN, J. A. :—

The judgment complained of is upon the defendant's counter-claim in which he asked for the specific performance by the plaintiffs of an alleged contract of sale by them to him of certain land, which belonged to the

plaintiffs as partners, and which was part of their partnership assets as contractors, builders and manufacturers of brick.

Judgment.

MAOLENNAN,
J.A.

The judgment dismisses the counter-claim as against the plaintiff Crain on the ground that no contract was entered into by him, but relief is granted against the plaintiff Mix to the extent of an undivided moiety of the lands with an abatement of one-half of the purchase money.

Upon a part of the land there was a brickyard, with buildings, sheds, machinery and plant used by the plaintiffs as partners, in connection with their business as manufacturers of bricks, and the alleged contract reserved to the partners the right to remove the same at any time within two years from its date, and also the right during the same period of occupying the premises then actually under use for storing the brick, plant, machinery, etc.

Neither the alleged contract nor the judgment makes any reference to the title which the purchaser is to receive as regards the debts and liabilities of the partnership, or the rights of the partners as between themselves; and it is not apparent whether the purchaser is intended to take subject to Crain's rights as a partner, or whether Crain being a party to the action the judgment ordering the conveyance of an undivided moiety to the defendant is to estop him from resorting to that moiety in the adjustment of the partnership accounts. If it were proved or admitted that in any possible event of the partnership accounts the plaintiff Mix would be entitled to at least a full half of the surplus assets after payment of debts and liabilities, such a judgment as the present would give the defendant a good title to an undivided half, because at law the partners are tenants in common in equal shares. But there is not a word in the pleadings or evidence as to the state of the partnership accounts, or as to the relative shares or interests of the partners in the assets. Although there is no doubt that a partner may sell his share or interest either in the whole of the assets, or in some particular part of them,

Judgment. and although his interest may be taken and sold under execution, the sale in any such case is subject to the partnership account. At p. 351 of Lindley on Partnership, 5th ed., the well settled law is stated thus: "In order to discharge himself from the liabilities to which a person may be subject as partner, every partner has a right to have the property of the partnership applied in payment of the debts and liabilities of the firm. And in order to secure a proper division of the surplus assets, he has a right to have whatever may be due to the firm from his co-partners, as members thereof, deducted from what would otherwise be payable to them in respect of their shares in the partnership. In other words, each partner may be said to have an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm; and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them, as partners, to the firm." See also Pollock on Partnership, 4th ed., pp. 100, 104. Therefore, for anything that appears in this case Mix's interest in this land, although at law an undivided moiety, may really be by reason of this partnership nothing at all. The firm were engaged in brickmaking on the land in question or part of it, and they were engaged in building contracts in Quebec. The liabilities may have been equal to the assets and the whole or the greater part of the capital may have belonged to Crain.

Under these circumstances it seems to have been a miscarriage, without either pleading or evidence, to have decreed a conveyance of an undivided moiety of this partnership land with an abatement of half the purchase money. The result may be productive of the greatest injustice either to the plaintiff Crain or to the defendant. For if Crain is not bound by the sale as of an undivided half free from his lien as a partner the defendant may receive little or nothing for a large sum of money; and if Crain is bound then the Court

has taken away his partnership rights in this land without either pleading or evidence to support such a judgment, without his consent and in spite of his resistance, and without any equivalent for his loss.

Judgment.

MACLENNAN
J. A.

The case made by the defendant in his counter-claim is a contract by both plaintiffs to sell to him the entire interest in the land; and it was only during the course of the trial when his case against Crain failed altogether that he said he was willing to take what Mix could give, and gave up his case against Crain, which was dismissed with costs. If the judgment had been for a sale of an undivided moiety subject to the partnership accounts, with a proportionate abatement of price, it would have produced no great injustice to either Mix or the defendant, although it is not very likely the defendant would have accepted such a judgment. But I think with great respect that the judgment in its present form cannot stand, and ought not to have been pronounced. Although I think the fact that this property was partnership property, and was known to be so by the purchaser at the time, and that the plaintiff Mix never professed to have authority to act for his co-partner, or to be able to bind him, should alone be a sufficient reason for refusing specific performance with compensation, even if Mix had assumed to sell the whole and had agreed to procure the concurrence of his partner, I must say with great respect that a careful perusal of the evidence since the argument leads me to a different conclusion from that reached by the learned Chancellor. I do not think this partner either did or for a moment meant to agree to sell the whole, or to become bound to procure his partner's concurrence. I do not think it was intended by either party that there should be any contract between them apart from the deeds. Great stress was laid upon Mix's statement that he would take the chance of Crain signing the deeds. That is a vague expression and might mean much or little. Mr. Watson's argument was that the bargain he relied on was made on Monday, the 4th of May; that it was on that day Mix said he would take the risk. Both

Judgment.
MAULENNAN,
J. A.

parties agree that when the terms were settled between them they went to Mr. Brown, a solicitor, to have the papers prepared. This was on the same day, the 4th, and the instructions were given, and Mr. Brown said he would have the papers ready in a couple of days.

Now, the papers for which instructions were given were, not a contract between Mix and the defendant but a conveyance from both partners to the defendant, and a mortgage back from the defendant to the partners. These were got ready and are dated on the 6th, and the deeds were sent to Quebec for execution by Mr. Crain. I think these instruments proclaim with no uncertain sound that the true agreement which these parties made by parol, if they really thought they were making any agreement apart from the deeds which they had directed to be drawn, was that the two partners were to sell the entire interest in the land for the sum named, and not that Mix made himself in any way responsible to sell the whole. Mix expected his partner would agree; he thought he could induce or persuade him to do so, and so strong was his belief that this would be so, that he gave Rapple authority to take possession. Then what was the significance of his statement that he would take the risk of his partner executing the deed?

It is Mix himself who makes the statement, first in his examination for discovery: "What I said was that I thought Mr. Crain would accept the offer, and at any rate I would take the chances and have them send the deed down to Mr. Crain," and again, at the trial: "Yes, he renewed his offer of \$2,300, and I said I would accept his offer, and we would get documents prepared by a solicitor, and I would take my chances and send them down to Mr. Crain for his signature. I expected Mr. Crain would consent." Under what circumstances were these words used? He had written to his partner either on the 1st or 2nd of May, telling what was proposed and asking his approval. On the 4th he had not heard from him. The natural thing to do was to wait till he did hear before preparing the deeds.

He is eager to make the sale, and he says: "I shall not wait any longer. Let us have the documents prepared at once and send them down for his signature; I will take the chances of his signing; I am so confident of it I will authorize you to take possession and will have the deeds drawn and sent down. If he signs, well and good, if not, I must only protect you in respect of what you do upon the land, and lose the expenses of preparing the deeds." I think that is all he meant by taking chances. I think he never led the defendant to expect that he was to get the land or any interest in it if his partner refused his concurrence, and I do not think that either of them had any idea but that the matter must fall through unless Crain consented. I think, therefore, with great respect, that this case is no more than a negotiation for the sale of an entire interest in this property, which failed of effect because one of the intended parties to it refused to agree to the terms to which the other parties had assented.

I am therefore of opinion that the appeal should be allowed, and that the counter-claim should be dismissed as to both the plaintiffs with costs.

Judgment.
MACLENNAN,
J.A.

Appeal allowed with costs.

HOLLIDAY V. HOGAN.

Principal and surety—Satisfaction of principal debt—Release of debtor—Release of surety.

A creditor may by express reservation preserve his rights against a surety notwithstanding the release of the principal debtor, the transaction in such a case amounting in effect to an agreement not to sue, but if the effect of the transaction between the creditor and the principal debtor is to satisfy and discharge and actually extinguish the debt, there is nothing in respect of which the creditor can reserve any rights against the surety.

Judgment of the Chancery Division, 22 O. R. 235, reversed.

Statement. THIS was an appeal by the defendants from the judgment of the Chancery Division, reported 22 O. R. 235, the facts being shortly as follows :—

One Hogan was a hotel proprietor, and had been dealing with the plaintiff, who was a brewer, and with the defendants Jackson & Hallett, who were grocers and liquor dealers. On the 8th February, 1890, he made a chattel mortgage to Jackson & Hallett for a debt of \$1,500, payable with interest at eight per cent. : \$300 on 8th June, 1890, seven monthly instalments of \$100 each, and a final instalment of \$500 on 7th February, 1891. On the 10th May, 1890, he made a mortgage of the same goods to the plaintiff for a debt of \$600, the terms of which did not appear. On the 3rd of June, 1890, a promissory note was made by Hogan and his wife for \$600, payable in one year, with interest at five per cent., to the order of Jackson & Hallett, which was discounted with the plaintiff, who paid the proceeds to Jackson & Hallett, the indorsers.

In connection with this note and discount a deed was executed between Jackson & Hallett of the first part, Hogan of the second part, and the plaintiff of the third part, dated the same day as the note, whereby, after reciting the mortgage to Jackson & Hallett, and that to the plaintiff, and that both mortgagees had agreed to give the defendant an extension of time, it was stated that Jackson & Hallett had agreed to indorse the note in question

for Hogan's account, that the plaintiff had agreed to lend him \$600 on it, to be paid to Jackson & Hallett, but not to be credited on their mortgage until paid by Hogan ; and it was agreed that Jackson & Hallett should assign their mortgage to the plaintiff to the extent of \$600, and should hold it as trustees for him to that extent as security for the note. It was also agreed that Hogan should have an extension of time for payment of the \$1,500 mortgage by paying it and the interest thereon at the rate of six per cent. instead of eight per cent. per annum, in monthly payments of \$100 each, beginning on the 8th of September following. On the same day by indorsement upon the mortgage Jackson & Hallett assigned it to the plaintiff to the extent of \$600, in accordance with the agreement contained in the deed above set out as security for the note ; but there was nothing in this indorsement any more than in the deed making Jackson & Hallett liable to the plaintiff for the loan, and that liability rested altogether upon their indorsement of the note. Statement.

On the 7th February, 1891, the plaintiff and Jackson & Hallett joined in renewing the chattel mortgage for \$1,500 for the purpose of refiling.

Instead of making his payments monthly beginning on the 8th of September Hogan had neglected to do so and had paid nothing, and in February or March it was agreed between the plaintiff and Jackson & Hallett to endeavour to induce him to sell out to some good man who would assume his liabilities. This movement was successful, and on the 19th March, 1891, by agreement between all parties Hogan sold out his business, including lease, furniture, and stock, to one Lot Singular, for \$3,363. It was part of the bargain that the sum due to the plaintiff on his chattel mortgage and also on the note for \$600 should be assumed by Singular, that the plaintiff should take Singular for it, and that Hogan should be discharged. It was also agreed that Singular should have one or two years to pay these two sums if he should require it at five per cent. interest.

Statement.

During all the negotiations with Singular nothing seemed to have been said about the liability of the defendants Jackson & Hallett on the \$600 note. Before it became due, however, some ill feeling had arisen between the plaintiff and Jackson & Hallett, and when the note fell due on the 6th of June, 1891, the plaintiff had it presented at the bank and protested, and on the 11th June commenced this action. Singular borrowed money and offered to pay the claim to prevent further trouble, but a considerable sum was demanded for costs, and the attempt at settlement unfortunately failed, and the parties fell back on their strict legal rights. The action as far as Jackson & Hallett were concerned was in the usual form of actions against endorsers, and the defence relied on was the acceptance by the plaintiff of another debtor for the maker of the note.

The action was tried in October, 1891, at Guelph before ROBERTSON, J., who afterwards gave judgment for the plaintiff against the defendants Jackson & Hallett for \$646.25, the amount of the note sued on, with interest from the 3rd of June, 1890, and the costs of the action, and dismissed the action as against the defendants John Hogan and Margaret Hogan. This judgment was affirmed by the Divisional Court.

The defendants appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 25th and 26th of January, 1893.

Moss, Q. C., and T. P. Coffee, for the appellants. The trial Judge found that the plaintiff accepted Singular as his debtor instead of John Hogan and that Singular assumed the debt of Hogan to the plaintiff. This finding has been accepted and acquiesced in and the result of the finding is that in law no action whatever could be brought on the note in question as against the makers and therefore it cannot be maintained against the appellants, the endorsers. The liability of an endorser is measured by the liability of the acceptor or maker whose surety he is.

In effect this note has been paid and it is impossible to say that the appellants are liable in respect of it. It is of course possible to release a debtor reserving rights against a surety, but that is on the principle that the release takes effect merely as a covenant not to sue. If an actual release takes place and the debt is actually extinguished no rights can be reserved against the surety : *Webb v. Hewitt*, 3 K. & J. 438 ; *Wyke v. Rogers*, 1 D. M. & G. 408 ; *Cowper v. Smith* 4 M. & W. 519 ; *Bailey v. Griffith*, 40 U. C. R. 418 ; *Smith v. Winter*, 4 M. & W. 454 ; *Clark v. Devlin*, 3 B. & P. 363. Argument.

E. F. B. Johnston, Q. C., for the respondents. If the appellants are right in their contention then the surety has by his own act without the knowledge or assent of the debtor relieved himself from liability. It is clear that the debtor may be released and yet rights be reserved against the surety. If the surety agrees to the release and substitutes himself for the debtor he clearly remains liable, and that is what took place here : *DeColyar*, 2nd ed., p. 365 ; *Muir v. Crawford*, L. R. 2 Sc. App. 456 ; *Green v. Wynn*, L. R. 4 Ch. 204 ; *Ex parte Harvey*, 4 D. M. & G. 884. The debt was not extinguished in any way but merely transferred to a new debtor.

Moss, Q. C., in reply.

March 7th, 1893. BURTON, J. A. :—

I agree with the remarks made by the Judges below as to the action being a hard and unreasonable one, and I think it is unfortunate that they did not dismiss it on the short ground that the statement of claim was not proved. The allegation is that the note when due was duly protested, which involves the statement that it was duly presented for payment, which, even if done, would have been an absolutely futile proceeding, as the maker had been released.

The learned Judge expressly finds that the plaintiff did accept Singular as his debtor in lieu of Hogan, and his fur-

Judgment.
BURTON,
J.A.

ther finding, that he is not satisfied that in doing so the plaintiff intended to release the endorser, becomes unimportant.

The very nature of the transaction shows that there could have been no reservation of remedies against the maker of the note ; the result of such a reservation would have been to allow the sureties to retain all these remedies over against the principal debtor ; but he was making an absolute sale of the property to Singular, who was accepted by this plaintiff as well these defendants as their debtor.

It would require the clearest evidence under such circumstances of a reservation of rights ; but such a thing was never alluded to nor contemplated, and without express stipulations on the part of the sureties they could not be responsible for any default of Singular.

I think, with great respect, that upon the findings of the learned Judge the defendants were released, and the action should be dismissed.

OSLER, J. A. :—

The trial Judge found that the plaintiff had agreed to accept Singular as his debtor for the amount of the promissory note sued on instead of Hogan. I think the evidence of Hallett, Singular and Hogan proves this very clearly and the learned Judge acted upon it by dismissing the action against Hogan which he ought not to have done unless he was satisfied that as between the three parties Hogan, Holliday and Singular there had been a complete novation, Hogan's debt to Holliday being discharged and Singular being substituted for Hogan as Holliday's debtor.

The question then is what effect this transaction had upon the liability of the defendants Jackson & Hallett as endorsers of Hogan's note. The authorities cited by Mr. Johnston fully support the proposition that the endorsers of a promissory note or bill, like sureties upon any other contract, may continue liable to the holder though the maker or acceptor has been exonerated, where the holder

has expressly reserved his remedies against them : *Muir v. Crawford*, L. R. 2 Sc. App. 456 ; *Green v. Wynn*, L. R. 4 Ch. 204 ; *Ex parte Harvey*, 4 D. M. & G. 881 ; *Bateson v. Gosling*, L. R. 7 C. P. 9 ; *Ludwig v. Iglehart*, 43 Md. 39. Where there is a release, or a composition and release and at the same time the creditor's rights against the surety are reserved, the release will not be treated as absolute and unconditional, but as a mere covenant not to sue the principal debtor. The debt still exists as a debt and therefore if the creditor proceeds for it against the surety, the latter is not debarred from compelling the debtor to pay and thus to relieve him from his own liability to the creditor. But if on the other hand the force and effect of the transaction between the creditor and principal debtor is to satisfy and discharge and actually extinguish the debt, there is nothing in respect of which the creditor can reserve any rights against the surety ; and that appears to me to be necessarily the case when their dealing assumes the shape of a novation. The old contract has been rescinded and a new one created. The position is essentially different from that in which there has been a mere covenant or agreement not to sue. In the one case the debt for which the surety became responsible exists, though the creditor may as regards the debtor have disabled himself from suing for it. In the other it is gone altogether just as much as if it had been paid or absolutely released, and the creditor is no longer the creditor of the debtor for whom the surety had been responsible, but of a new and different debtor. This, it appears to me, is the result of the transaction by which Hogan has here been held to be discharged : Wharton on Contracts, secs. 852 *et seq.* ; Leake, 3rd ed., p. 686 : *Wilson v. Lloyd*, L. R. 16 Eq. 60. Had Jackson & Hallett sued him as the principal debtor to compel him to pay the note, I think he would have had a complete answer to their action. He would have said, I am no longer Holliday's debtor, a new contract has been made between him and Singular and myself by which for good consideration Singular has assumed my liability and I have been discharged.

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

The question here, though presented in the action against the sureties, is the same, and so must be the answer. The original contract between creditor, debtor and sureties is dissolved by the extinguishment of the debt. I cannot agree with Meredith, J., that the evidence establishes a reservation of rights against the sureties. I think that probably this did not occur to any of the parties, the plaintiff being satisfied with Singular's liability. It may be that if the plaintiff had thought about the matter at all, he would not have committed himself to the new arrangement or would have taken care that the endorsers should guarantee Singular as they had guaranteed Hogan; but it is too late to avoid the legal consequence of what has taken place, as found upon sufficient evidence by the trial Judge. On such a transaction there could be no reservation of rights any more than on such a state of facts as appeared in *Webb v. Hewitt*, 3 K. & J. 438, and for a reason the same in principle, viz., that the old debt had been satisfied: *Muir v. Crawford*, L. R. 2 Sc. App. 456.

I think Mr. Johnston's proposed amendments cannot help him, and therefore that the appeal must be allowed.

MACLENNAN, J. A.:—

[The learned Judge stated the facts as above set out and continued:]

With regard to the stipulations in the agreement of the 19th March, 1891, the learned Judge says he thinks the agreement was never reduced to a certainty, and there was nothing definitely agreed upon so as to make it binding between the parties. I think the uncertainty to which the learned Judge refers is the expression "one or two years," for I see no other uncertainty in the agreement. This is the learned Judge's own account of the evidence. "He (the plaintiff) and Hallett then talked over the matter, and plaintiff was then told that Hogan had sold out to Singular, and that Singular had by agreement with Hogan retained \$1,247.50 of the purchase money for him

(the plaintiff) for the payment of which he wanted the plaintiff to give him one or two years' time. Singular was present at this interview and said to the plaintiff, he would require to get this time for payment of the \$1,247.50. The plaintiff in reply said 'You can have all the time you want if you will pay five per cent.' Singular said he would do so, and both were apparently satisfied, the plaintiff stating at the same time to Singular that he could have all the beer, etc., he wanted, etc." It seems to me with great respect there is no uncertainty here sufficient to prevent it from being a perfectly good agreement, and that what Singular wanted was one or two years, that is he wanted the option of the one period or the other according as his convenience might require, and the plaintiff acceded to that. I think therefore the debtor could pay the sum named, namely the note and the mortgage with five per cent. interest thereon at the end of one year or at the end of two years at his option. With regard to the main agreement the learned Judge says his conclusion is that "the plaintiff agreed to accept and did accept Singular as his debtor in lieu of Hogan, and that Singular assumed the debts of Hogan to the extent of \$1,247.50, part of which was the promissory note now in question in this action," and so he dismissed the action against Hogan.

Judgment.

MACLENNAN,
J.A.

The learned trial Judge decided against the defence because in the agreements made between the parties it was not understood or intended that the defendants were to be released from their liabilities as indorsers, and that they did not ask the plaintiff to relieve them.

The Divisional Court affirmed the judgment, the learned Chancellor putting his judgment on the ground that the new arrangement had been made with the knowledge and consent of the endorsers, and that for that reason they could not claim to be discharged, quoting the general rule applicable to sureties.

Mr. Justice Meredith has, as I cannot help thinking, misapprehended the finding of the learned trial Judge on

Judgment. the facts, for he says he agrees with the conclusion of the
MACLENNAN, learned trial Judge that it was understood by and be-
J.A. tween the parties that the defendants Jackson & Hallett should not be released from their liability to the plaintiff upon the promissory note in question. If that had been the case I think I should have had little difficulty in upholding the judgment. But I do not find that the learned trial Judge anywhere says that he has come to that conclusion, nor do I think the evidence would warrant it. I think the most the learned Judge says, and that the evidence warrants, is that no one thought about the defendants' liability one way or another.

The question, therefore, is, whether by the mere effect in law of what took place between the parties the defendants Jackson & Hallett remained still liable to be sued as endorsers of this note, or whether the note was not thereby discharged and extinguished for all purposes.

With great respect, I think the latter is the proper conclusion.

This is not a case of time given, or a release, or an alteration of the terms of the principal contract, leaving the subject of the guarantee still unfulfilled or unsatisfied, but a case in which the very purpose for which the guarantee was given has been fulfilled. The liability for which the defendants were sureties has been satisfied, and the subject of the suretyship is gone and no longer exists. Hogan's debt is as much satisfied and discharged as if he had paid it in money.

In such a case it requires no understanding or intention to discharge the surety. His discharge is the legal effect of what has been done. If the plaintiff had taken money or goods, or service, or any other valuable consideration from Hogan in satisfaction of the note, it would be too plain for controversy that the endorsers were discharged. The endorsers' contract was to pay if Hogan did not, but Hogan did pay. He sold his stock-in-trade, his furniture, and other chattels, and his business, to Singular, and by arrangement between them the plaintiff took a sufficient

portion of the purchase money coming from Singular in satisfaction for the note. Judgment.

MACLENNAN,
J.A.

The plaintiff might have taken this as additional or collateral security, but he did not do so, he took it in satisfaction. That is clearly proved, and it is Hogan's defence, and the action against him is dismissed. I do not see, therefore, how it can be contended that the suretyship remains, seeing that the subject of it is gone and no longer exists.

The sole question is, was the debt for which the defendants were sureties satisfied? If it was it makes no difference, in my judgment, what the nature of the satisfaction was, whether it was money or goods, or a debt due from a third person. If instead of being a novation, by which Singular became legally liable by express contract to pay the plaintiff, it had been an assignment of the debt by Singular to the plaintiff, and the latter had accepted it in satisfaction of the note, I think the suretyship must equally have come to an end as if the note had been satisfied by cash.

The cases in which the liability of the surety has been held to continue after release of the debtor have been, as I think, invariably cases where a release has been given without satisfaction, when the subject of the suretyship therefore still substantially remained. But here there has been satisfaction. The old debtor for whose default the surety became responsible is no longer a debtor. There is a new debtor. But the new debt is not the same debt. When the note was presented for payment at the bank it was an empty form. It gave rise to no default. There could be no default, where there was no obligation. I have pointed out that the plaintiff received satisfaction for the note. If so he cannot have a double satisfaction. If he recovers from the defendants, what is to prevent him from also recovering from Singular? I do not see how Singular could defend himself by setting up payment by the defendants. The action against him would not be

Judgment. upon the note but upon the special agreement, and payment by the defendants would be altogether immaterial. Again, if the defendants are made to pay, what remedy have they over? Clearly none against Hogan, for he has satisfied the note in the hands of the holder. Nor could they have any against Singular, for they are not sureties for him. If it be said that the mortgage still remains undischarged in the plaintiff's hands, I do not think that helps, for it is the same question, and if the mortgage debt is satisfied the mortgage also has served its purpose, and has no longer any life in it for the purpose of the note in question. The mortgagor has satisfied that also. That the new contract which arises in the case of a novation is in consideration of the discharge of the two original contracts is very evident and seems not to require authority: but see *Scarf v. Jardine*, 7 App. Cas. 345; Leake on Contracts, 3rd ed., pp. 684, 759. An example of novation is the settlement in the modern clearing house, by which enormous debts are satisfied without any actual payment, by mere novation, the effect of which in law is exactly the same as if actual payment had been made.

I think therefore that the plaintiff having obtained satisfaction of the note in question the defendants' contingent liability thereon ceased and did not and could not become an absolute liability to the plaintiff; that the subject of the suretyship having been extinguished the suretyship itself necessarily ceased and came to an end, and that the plaintiff's action fails.

If it be said that as a result of all that took place the defendants became sureties for Singular in respect of the new debt, the action equally fails as being premature, for I think there was a binding agreement that Singular should have one or two years for payment, and that he could not be sued before the expiration of one year or two years at his option; and if Singular could not be sued when this action was brought, no more could the sureties, for there was no default.

I am therefore, with great respect, of opinion that the action fails, that the appeal should be allowed, and that the action should be dismissed with costs.

Judgment.
MACLENNAN,
J.A.

HAGARTY, C. J. O.:—

I agree.

Appeal allowed with costs.

THE MANUFACTURERS' LIFE INSURANCE CO. V. GORDON.

Insurance—Life Insurance—Premium note—Action on after forfeiture—Condition—Month.

Under a life policy providing that "a grace of one month will be allowed in payment of premiums, at the expiration of which time, if said premium remain unpaid, this policy shall thereupon become void," and also that "if any note given on account of the premium be not paid when due this policy shall be void and all payments made upon it shall be forfeited to the company," the insurance comes to an end upon default in payment of a premium note, unless the insurers elect to keep it in force, and proceedings by the insurers to collect a note given for a premium are not sufficient evidence of such election. Nor are equivocal acts such as carrying the policy in the books of the insurers as an existing policy and including the amount in their official returns of insurance in force any evidence of waiver of the forfeiture, these acts not being known to the insured or intended to influence his conduct.

McGeachie v. North American Life Assurance Co., 20 A. R. 187, applied and followed.

"Month" in an insurance policy in the form here in question, with provisions for payment of semi-annual premiums on named days of specific calendar months means a calendar month.

Per HAGARTY, C. J. O., and OSLER, J. A.—*Scinde*. Payment must be made during the life of the insured, and if the life drop before the expiration of the time of grace and before payment the risk comes to an end.

Per BURTON, and MACLENNAN, JJ. A. Payment may be made at any time before the expiration of the time of grace whether the life has dropped or not.

Judgment of MACMAHON, J., reversed.

THIS was an appeal by the plaintiffs from the judgment ~~MacMahon~~ of MACMAHON, J.

The action was tried at Ottawa on the 25th and 27th of April, 1892, and on the 16th of July, 1892, the following judgment, in which the facts are stated, was delivered:

Judgment. **MACMAHON, J. :—**

MACMAHON,
J.

Action for the cancellation of a policy of insurance issued by the plaintiff company on the life of Daniel John Baillie Gordon, for the sum of \$5,000 (the amount being made payable to his wife Kate S. Gordon, the defendant), upon the ground that a note given by the insured the said D. J. B. Gordon, which matured on the 8th October, 1891, for the half-year's premium falling due on the 5th of July, 1891 (being within two years of the issuing of the said policy), was not paid at maturity, and thereupon, as the plaintiffs allege, the said policy became null and void under the conditions contained in the application and policy. The policy is dated the 22nd of July, 1890, and by its terms the semi-annual premium of \$77.75 is to be paid in advance to the company on the 5th days of July and January in each year. By one of the provisions of the policy—(H)—“a grace of one month will be allowed in payment of premiums, at the expiration of which time, if said premium remain unpaid, this policy shall thereupon become void. But a reinstatement will be permitted if application therefor be made in writing to the company at its head office within two months after the expiration of the one month's grace accompanied with a certificate of good health from a medical examiner of this company, subject to its approval, provided always that whenever advantage is taken of this grace or of the privilege of reinstatement, interest shall be paid to the company at the rate of six per cent. per annum for the time deferred.” And on the back of the policy is endorsed: “If within two years from the date named for the commencement of this insurance * * any note, cheque or other obligation given on account of the first or second year's premium be not paid when due * * this policy shall be void and all payments made upon it shall be forfeited to the company,” etc.

At the foot of the medical examination, which was signed by Gordon (and which was referred to in the application as

forming part of it), there is an agreement that if any note or other obligation given for the first or any subsequent premium be not paid at maturity the policy shall thereupon become void *but the note, etc., must nevertheless be paid.*

Judgment.
MACMAHON,
J.

This cannot be deemed a condition or stipulation in any way modifying the effect of the policy, as under section 27 of R. S. C. ch. 124, all conditions, stipulations and provisos to affect any policy after the first of January, 1886, to be valid must be set out on the face or back of the policy.

The half-year's premium due the 5th July, 1891, not being paid when due, the agent of the company at Ottawa delivered the receipt for the premium to Gordon and accepted his (Gordon's) note dated 5th August, payable in sixty days, for the amount, \$77.75, which was not paid at maturity. The company's agent at Ottawa on the 9th of November notified Gordon that if the note were not paid by the 16th it would be put in suit for collection.

The note was put in suit on the 3rd of December, and judgment was entered on the 30th of December, 1891, for the amount of the note, with interest and costs. On this execution was issued, which was returned *nulla bona* on the 7th of February, 1892. The Division Court bailiff said he had advertised Gordon's goods for sale, and that they were under seizure until Gordon's death, which occurred on the 4th of February. He said he might have realized fifty or sixty dollars from a sale of the goods, and the reason he did not sell was because there was a settlement with the company's solicitors, who agreed to accept ten dollars per month on the execution.

A letter from the plaintiffs' solicitors dated 18th of January, 1892, was put in, in which they state the company is willing to accept payment of the claim in instalments of ten dollars per month; the first payment to be made immediately, and the bailiff's fees to be paid by Gordon.

This offer was not acted upon, as no instalment was paid in accordance with its terms. In fact when the letter reached Gordon, he was suffering from the illness from which he afterwards died.

Judgment. On the 21st of January, Mr. T. C. Bate saw the company's agent, A. E. Bradbury, to whom he said he had called to pay the judgment and the next premium, when Bradbury said he would ascertain the amount of the Division Court costs, and would let him (Bate) know the whole amount.

MACMAHON,
J.

On this occasion, which was the first Bradbury said he heard of Gordon's illness, Bradbury gave Bate a "health certificate," which he desired should be signed by Gordon. Bate said that Gordon did sign the certificate in blank, but it was never filled up, and was not returned to Bradbury. On the following day (22nd January), Bradbury went to Bate's office and said he had given him the wrong certificate, and then gave him a short form medical examiner's certificate to be filled up after a re-examination of Gordon by the company's medical examiner. This the company's agent considered necessary, because, as he stated, thirty days had elapsed since the premium was overdue—he referred to the premium represented by the promissory note which had been overdue since the 8th of October previous.

On the 22nd of January, 1892, the solicitor of the company informed Mr. Bradbury that their expenses (I suppose costs) in connection with the judgment in *Manufacturers' Life v. Gordon*, amounted to \$8.89, which included the solicitor's fees payable by the company.

On the 5th of February, Mr. Christie, the solicitor for Mrs. Gordon, tendered the solicitors of the company \$82 in payment of the judgment, and on the same day Mr. Bate tendered to the agent of the company \$78 for the half-year's premium which fell due on the 5th January, 1892, which was refused.

On the 8th of February, 1892, the managing director wrote the company's agent at Ottawa, a letter in which he was asked, "Did he (Gordon) know from you that the policy had lapsed?" The general manager then states: "I can not approve of your haste in putting this matter in the hands of a solicitor for collection. It matured last Oc-

tober, and it would have been far better to have waited a few months before suing. Had you let the matter stand as overdue until after the 5th of February, they could not possibly have made any claim with any ghost of a show ; as it is now they are going to make use of the judgment as a strong point in the contention that we considered the policy in force."

Judgment.
MACMAHON,
J.

On the 10th of February, the agent answered the managing director's letter, and in reply to the query as to notifying Gordon, he said : "As to whether I notified Gordon that his insurance had lapsed, I do not remember, but Gordon knew such was the case, for he met me on the street and told me the company was suing him for his note. I remarked, ' Well, you can't blame me ; ' he said, ' I suppose my insurance is gone now any way. ' I then said to him, ' Pay the note and we will get you reinstated. ' "

These letters were put in by the defendant's counsel.

The receipt given to Gordon when the company accepted his note is as follows : " Received from the owner of policy No. 6344, the semi-annual premium due July 5th, 1891, \$77.75. John F. Ellis, managing director. "

The note was accepted in payment of the premium, but by the condition endorsed on the policy, upon the non-payment of the note, the policy became forfeited unless there was a waiver by the company of its right to enforce the forfeiture.

The right of forfeiture is for the benefit of the insurers, and they may choose not to enforce it. And when the insurers had, as in this case, the promissory note of the insured, the company may intend to still carry the risk and enforce payment of the premium.

The payment of the annual premium upon a policy of life insurance is a condition subsequent, the performance of which, may or may not, according to circumstances, work a forfeiture of the policy : *Thompson v. Insurance Co.*, 104 U. S. 252.

The company, by demanding payment of the note ; by suing for the amount of the note and the accrued interest

Judgment. thereon; by obtaining judgment and issuing execution
MACMAHON, thereon; making a seizure thereunder, and claiming to
J. recover the amount of such judgment down to the day
of the death of the insured, are, it is urged, estopped from
setting up that the policy was forfeited by nonpayment of
the note at its maturity.

Mr. McCarthy urged, on the authority of *Knickerbocker Life Insurance Co. v. Pendleton*, 112 U. S. 696, that there was an absolute forfeiture of the policy by nonpayment of the note and that the company was entitled to sue and recover the amount of the note (the insured having had the benefit of the insurance during the interval), without waiving the forfeiture. In that case there was nothing done by the company evidencing a waiver of the forfeiture after the maturity of the bill which had been accepted in payment of the premium.

To the same effect is *Thompson v. Knickerbocker Life Insurance Co.*, 5 Bigelow Life Ins. Cas. 8. Had the company in this case been paid the amount of the overdue note and interest when the notification was sent by the company's agent to Gordon on the 9th of November, or had the judgment been paid by Mr. Bate on the 21st of January, 1892, there can hardly be a question that the then receipt of the premium would have been a waiver of any forfeiture. Even in the case where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt: *Davenport v. The Queen*, 3 App. Cas. 115. The company did not deal with the policy as having been forfeited. It was carried in the company's books as an existing risk; and in the statutory return made to the government, sworn to by the president and managing director on the 24th of February, 1892, the policy issued to Gordon is included as being amongst those in force on the 31st of December, 1891. The contract being unilateral, it is only by receiving and accepting Gordon's note that the company was in a position to sue for the purpose of enforcing payment of the

premium. Had Gordon's goods, which were advertised for sale on the 16th of January, been sold under the execution, it is possible they might have realized sufficient to meet the judgment, in which case the premium would have been paid for the half-year ending the 5th of January, and the month's grace for payment of the succeeding half-year's premium would not have expired until the 5th of February, 1892. However, within the month's grace, the amount of the judgment debt and costs was tendered to the company's solicitor, and within such month's grace the premium for the succeeding half-year was also tendered to the company's agent and refused.

Judgment.

MACMAHON,
J.

A question arose as to whether under the policy the month's grace should be considered a lunar or a calendar month. In *Simpson v. Margitson*, 11 Q. B. 23, where the words in a written contract were "If the estate were not sold within two months;" it was held that this by itself meant "two lunar months;" unless there was admissible evidence that the parties meant "calendar months." So in *Nudell v. Williams*, 15 C. P. 348, where, in a lease, the plaintiffs were entitled to "the month" next after the expiry of the old lease within which to pay for improvements, it was held that the naked expression "month" meant a lunar month. In *Hart v. Middleton*, 2 C. & K. 9, Pollock, C. B., said: "In legal matters 'a month' means a lunar month, but in commercial matters 'a month' always means a calendar month. In bills of exchange, promissory notes, invoices, times of credit, and everything else relating to commercial matters, it is so; and I know of no instance to the contrary." The issuing of a policy of insurance can hardly be regarded as a commercial matter, so that authority does not help. In *Simpson v. Margitson*, 11 Q. B. 23, Lord Denman, C. J., at p. 32, said: "Nor can we find any authority for saying that the conduct of the parties to a written contract is alone admissible evidence to vary the meaning of the word 'month.'" However, in the present case the company in accepting the note of the 5th of August, treated month as a calendar month in the business of life in-

Judgment.
MACMAHON,
J.

surance. The letter from the agent at Ottawa of 5th of February to the managing director of the company in which he says: "The days of grace of the second half-year expire to-day," and the letter of the managing director to the agent of February 8th in which he states: "Had you let the matter stand as overdue until after the 5th of February, they could not possibly have made any claim with any ghost of a show" is evidence of what the meaning of "month" is in the particular business of life insurance. See *Simpson v. Margitson*, 11 Q. B. 23, at p. 32.

If there is any question as to this the defendant should be allowed to give further evidence on the point as to the sense in which the word is used in the particular business of insurance.

The case of *Simpson v. Accidental Death Insurance Co.*, 2 C. B. N. S. 257, to which counsel for the plaintiffs referred, turned upon a condition in the policy permitting the directors, when a new premium should become payable, to terminate the risk by refusing to accept such premium. In *Want v. Blunt*, 12 East 183, also cited, where a tender of the premium by the member's executors within the fifteen days' grace allowed by the policy of the society was held too late, the judgment turned on the rules of the society which required the payment, when made during the days of grace, to be made by the member in his lifetime in as good health as when the policy expired. And in *Lantz v. Vermont Life Insurance Co.*, 139 Pa. St. 546, where the authorities are reviewed, the policy stipulated for payment of quarterly premiums by the assured, provided that should they not be paid at the dates named in the lifetime of the assured the policy should cease and determine.

Under the term in the policy giving a month's grace within which to pay the premium the tender on the 5th of February was a good tender.

The plaintiffs' claim must be dismissed with costs, and the defendant's counter-claim must be allowed and judgment entered for the defendant for the sum of \$5,000 less the premium \$77.75, with interest from the 5th of February, 1892, and full costs of suit.

The plaintiffs appealed and the appeal was argued before **HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.,** on the 2nd and 3rd of February, 1893. Argument.

W. Nesbitt, and R. McKay, for the appellants. Immediately upon nonpayment of the note given by the insured the policy became void: *Neill v. Union Mutual Life Insurance Co.*, 45 U. C. R. 593; 7 A. R. 171; *Robert v. New England Mutual Life Insurance Co.*, 1 Disney, 355; affirmed, 2 Disney, 106; *Pitt v. Berkshire Life Insurance Co.*, 100 Mass. 500; *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696. The suing of the note and obtaining judgment thereon, and proceeding to enforce the judgment, cannot be relied upon as a waiver of the condition voiding the policy, as the company having carried the policy during the period for which the note was current, had given consideration for the note, and were therefore entitled to collect it without thereby recognizing the policy as still existing: *McGeachie v. North American Life Insurance Co.*, 20 A. R. 187. Moreover the plaintiffs were entitled to collect the note under the agreement signed by the insured contained in the medical examination, which forms part of the application, and their proceeding to collect the note under the express terms of the agreement, could not amount to a waiver of the condition endorsed upon the policy. R. S. C. ch. 124, sec. 27, does not affect or render this agreement invalid in any way, as the agreement is not a condition, stipulation, or proviso, modifying the effect of the policy. It is simply an agreement referring to a note which may be given, something entirely distinct and separate from the policy and to the rights of the company under such note. But even if it should be held that the effect of R. S. C. ch. 124, sec. 27, is to render this agreement invalid, still the company having proceeded to collect the note under such agreement, and under the *bona fide* belief that the agreement was valid and binding, cannot be said to have thereby waived the forfeiture of the policy: See *Bliss on Life Insurance*, 2nd ed., p. 446; *Brown v. Bowen*, 30 N. Y. 519;

Argument. *Simpson v. Accidental Death Insurance Co.*, 2 C. B. N. S. 257; Cooke on Life Insurance, p. 185. The defendant and the insured were not in any way prejudiced or influenced by the action of the company in suing upon the note, as they were well aware of the existence of the agreement, and that the company was acting or intending to act thereunder, and the insured was not in any way led to believe that the policy was in force. The tender of the premium on the 5th of February, 1892, was not a good tender, because it was not made during the life of the insured: See Bliss on Life Insurance, 2nd ed. p., 312; *Pritchard v. Merchants, etc., Life Assurance Society*, 3 C. B. N. S. 622; *Simpson v. Accidental Death Insurance Co.*, 2 C. B. N. S. 257. The cases in regard to receipt of rent under a lease which has been forfeited do not in any way apply to this case. The principle on which all these cases proceed is, that the receipt of rent as rent, is an acknowledgment of the tenancy as existing. In this case the money if recovered, would not have been recovered as premium due upon an existing policy, but as money due upon a note for which consideration had been given. The including of the amount of this policy under the head of "Policies in force" by the company in their return to the government, cannot be relied upon as any evidence of waiver by the company of the forfeiture, or in any way as estopping the company. There is no evidence that this return was in any way communicated to the defendant or to the insured, or that the insured and the defendant had any notice or knowledge thereof; or were in any way affected or prejudiced thereby. The evidence of the manager of the company clearly shews that it was so put in the return for reasons connected solely with the internal management of the business of the company, and not with any intention to in any way influence or affect the defendant or the insured. A life insurance policy is not a commercial contract, and therefore the word "month" in the clause of the policy allowing the grace in payment of premium, means "lunar month." This being the case,

the tender of the premium on the 5th of February, 1892, **Argument.**
was too late: Bliss, 2nd ed., p. 312; *Simpson v. Margitson*,
11 Q. B. 23; *Nudell v. Williams*, 15 C. P. 348; *Hart v.*
Middleton, 2 C. & K. 9.

Shepley, Q. C., for the respondent. The appellants claim that the policy was issued upon a condition in the application therefor to the effect that if a note given for a premium was not paid at maturity, the policy should be void. But there was no such condition in the application for the insurance, and the alleged condition in the medical examination cannot be appealed to, for by section 27 of "The Insurance Act" such a condition to be valid must be expressed on the face or back of the policy. Assuming, however, that the condition applies, the promissory note given for the premium due on the 5th of July, 1891, was payment by Gordon of that premium, and the unconditional delivery up to Gordon of the official receipt of the company for such premium, without any explanation to the contrary, is conclusive evidence of such payment: *Illinois Central Company v. Wolf*, 37 Ill. 354; *Insurance Company v. French*, 30 Ohio St. 240; approved of in *Thompson v. Insurance Co.*, 104 U. S. 252; *Compagnie d'Assurance v. Grammon*, 24 L. C. Jur. 82. Moreover, all the acts, statements and conduct of the company are explicable only upon the assumption that any right of forfeiture of the policy was waived. At most, it was optional for the appellants to declare the policy forfeited for breach of a condition, and to create a forfeiture of the policy some act had to be done by the appellants to evidence the exercise of such an option; but the acts, statements and conduct of the appellants show conclusively that they did not intend to forfeit the policy: *Smith v. City of London Insurance Co.*, 11 O. R. 38; *Bouton v. American Mutual Life Insurance Co.*, 25 Conn. 542; *Bodine v. Exchange Fire Insurance Co.*, 51 N. Y. 117; *Horton v. Provincial Provident Institution*, 16 O. R. 382; 17 O. R. 361. Life insurance is a commercial transaction, and "month" in such a transaction means "calendar month." At all events in this

Argument. particular case it has that meaning for the general manager of the appellants and the other officers expressly refer to the word "month" as meaning to them "calendar month," and the whole scope of the policy is based on a reference to the calendar year: See Leake on Contracts, p. 446. The right to pay within the month's grace is not made conditional upon the survival of the assured and it is clear that payment within the month, even after the assured's death, would be good. Therefore the tender of the January premium was made in time and the policy was kept in force.

W. Nesbitt, in reply.

March 7th, 1893. HAGARTY, C. J. O. :—

A semi-annual premium was payable on the 5th of January; it was not paid. The insured died on the 4th of February, the premium still unpaid, but within the month, and on the 5th of February, also within the month (if the month be calendar) the amount was tendered and refused.

The life, the subject matter of the insurance contract, had dropped—a premium being in default. The beneficiary under the policy (the defendant) insists that as payment was tendered within the month, there was in fact no default, but an absolute continuance of the risk until the end of the month.

I feel great difficulty in accepting this view. The whole scheme of insurance seems based upon the payment in advance at the commencement, or, as it were, to start the running or inception of the risk. When default was made by nonpayment on the 5th of January, the risk was at an end or had ceased to continue, subject to a provision in the way of a grace or indulgence to the assured by payment within a month; but under another provision, with interest from the time of actual default. But if the assured die on the second day of the month without payment, are his representatives entitled to offer payment twenty-nine days

after the life had dropped? That is the proposition the defendant has to assert.

Judgment.

HAGARTY,
C.J.O.

I do not profess to know anything as to the usage or custom of life assurance companies or how they are pleased to understand such provisions. I have nothing to guide me on this question of construction beyond what the appeal book presents, and the arguments of counsel thereon, and the external evidence. On the very fullest consideration which I can bestow on the case, it appears to me that after the life has dropped, no tender or offer to pay can avail.

The whole subject matter of the insurance was gone, and the risk had terminated. If not, then in the case just suggested, the risk continued for say twenty-eight days until the month was nearly up; although the company had no existing premium to support the risk, and never might have any, nor could they enforce any. The representatives might tender or not as they pleased.

I think we must construe the policy as only granting this grace so long as the life was in being, so long as there was a life which the risk covered or to which it applied. A half-yearly or yearly premium, paid in advance, is an unmistakable right to insurance for that period, absolute as a matter of contract. For an extra month payment will re-establish the contract; but there must be the existence of the life on which the risk is to continue or to attach. Reading this provision H. as offering two extensions of time we have first the option or privilege of paying within a month; secondly, an agreement to reinstate the assured for a period of two months after the end of the month on condition of his being in good health, etc., and then if advantage be taken "of this grace or of the privilege of reinstatement" interest at six per cent. shall be paid for the time deferred. I think the whole of this provision points irresistibly to the assumed existence of the life when either the grace of one month or of the extra two months, is sought to be availed of.

Judgment.

HAGARTY,
C.J.O.

There is a whole month given within which the risk on the life may be kept alive.

The words "at the expiration of which time, if said premium remain unpaid, this policy shall thereupon become void," must mean as addressed to a living man; "if you let this month pass without paying your policy is void."

Here the life dropped with a premium in advance unpaid. The tender after death could not in my judgment avail.

The whole subject matter of insurance was gone, and the risk ceased. Death before payment within the month closed all as it seems to me. Payment within it started the risk again, if the subject to which the risk attached still existed.

We have not been referred to any direct authority on this point.

Byles, J., says, in the much quoted case of *Pritchard v. Merchants, etc., Life Assurance Society*, 3 C. B. N. S. 622, at p. 644: "As to the effect of a payment of the premium on a life policy after the expiration of the period covered by the policy, and within the number of days usually allowed by the conditions for making the payment, or as they have sometimes been called, the days of grace, I am not aware of any authority on the subject except what fell from this Court in the recent case of *Simpson v. Accidental Death Insurance Co.*, 2 C. B. N. S. 257."

The facts in *Pritchard's Case* were too unlike the present to be a guide. But the remarks of the Judges throughout the case incline my mind to the belief that payment within the named time of grace must be while the life (the subject matter) is in existence.

On the other branch of the case as to the previous half-year's premium and the alleged waiver by the company, or the effect of the action on the note, and other proceedings, I have had the advantage of reading the judgment of my brother Osler, and I adopt his reasoning and conclusions.

I think the appeal must be allowed.

BURTON, J. A. :—

Judgment.

BURTON,
J.A.

There are two questions involved in this appeal; 1st, whether the policy was avoided on the nonpayment of the note, and 2nd, if not so avoided, whether the tender of the premium on the 5th of February, after the death of the assured, was sufficient.

I deal with the last question first.

I am, I confess, a little surprised at any question arising at the present day as to the liability of a life assurance company where the assured dies within the days of grace, but before the payment of the premium, provided that it is paid within the extended period. In practice no company disputes such liability and in most cases they have remodelled their contracts so as to place the matter beyond question.

This was done in consequence of the dicta which fell from some of the Judges during the argument in *Pritchard v. Merchants, etc., Life Assurance Society*, 3 C. B. N. S. 622, and *Simpson v. Accidental Death Insurance Co.*, 2 C. B. N. S. 257, in 1854, which led to an almost universal change in the form of life assurance policies so as to remove all ambiguity or doubt upon the subject and no one doubts that a policy of assurance like all other written contracts must be construed according to the meaning of the parties expressed in it.

As the point was strenuously urged in the present case and in another recently before us, I shall discuss it more fully than I should otherwise have done, as I considered it as perfectly well established that since that change the liability was unquestioned.

A good deal of confusion has arisen from treating a contract of life assurance as a contract of indemnity, whereas it is a mere contract to pay a certain sum of money at a certain time in consideration of certain stipulated payments.

The contract is not like a fire or marine assurance policy for a single year or a single voyage with a privilege of renewal from year to year by paying the annual premium;

Judgment.

BURTON,
J.A.

but is an entire contract for assurance for life subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums. Such is the form of the contract and such is its character.

The question first arose in a fire insurance case—*Tarleton v. Staniforth*, 5 T. R. 695. The insurance was from half-year to half-year as long as the insurers should agree to accept the same, with fifteen days' grace, but there was to be no insurance until the premium was actually paid.

The loss occurred within the fifteen days but before payment of the premium. The previous half-year's contract was at an end; two things had to concur before any new contract of insurance was effected, that the insured should pay the premium and that the insurers should agree to accept it.

There was in fact no contract then in existence and if the premium had been tendered before the fire the company were not bound to accept it.

The question in all these cases is whether upon the true construction of the whole instrument the loss occurred whilst the policy was still in force, and although it is quite clear that *Tarleton v. Staniforth* was, under the facts in that case, rightly decided, it effected a revolution in that kind of business. The Sun fire office issued an advertisement stating that all persons insured in their office by policies for one year or any longer term were and always had been considered by the managers as insured for fifteen days beyond the time of the expiration of their policies.

In an action brought some time subsequently against the same office, *Salvin v. James*, 6 East 571, it was held this did not estop them before the expiration of the insurance from declaring that they would not renew the insurance, except at an increased premium; and that they had still the right therefore to decline to renew the insurance; but the Court there held that in default of a reasonable notice, before the expiration of the contract, to that effect, the policy would have remained in force for the fifteen days, and the company would have been liable notwithstanding that the premium had not been paid before the loss.

To the same effect is *McDonnell v. Carr*, Hayes & Jones, 256, where on the true construction of the policy, it was held to be in force for one year and fifteen days.

Judgment.
BURTON,
J.A.

These are all different from the case we are considering, which is one of a contract for life, not determinable at the will of the assurer.

The case of *Want v. Blunt*, 12 East 183, has no application. That was the case of a member of a society effecting a policy of assurance in consideration of a payment by him during his life, and the payment of his proportion of the contributions which the members of the society should, during his life, be called on to make.

The Court held that no person could be assured unless he was a member; that the members were insuring each other, and that the paying a premium for another quarter was making a new assurance, and that the whole frame of the policy shewed that every premium must be paid during the life of the assured.

If that was the true construction of the policy it warranted the conclusion arrived at.

I come now to the two cases the dicta in which led to the change in the frame of the policies now generally in use.

The first of these, *Simpson v. Accidental Death Insurance Co.*, 2 C. B. N. S. 257, was not a case of life assurance in the ordinary sense of the term, but was an insurance against accident.

There, as in *Tarleton v. Stanforth*, 5 T. R. 635, the company were not bound to accept the premium if tendered, and it was in effect a grant of so many days during which the assured might effect a renewal if the company chose to renew, but not otherwise.

The case of *Pritchard v. Merchants' Life Assurance Society*, 3 C. B. N. S. 622, has been treated in the same manner except for some of the dicta which led from which the Judges during the argument were persuaded that the policy was made until after the death and after the expiry of the days of grace. The policy, as in the case of *Simpson*, was not a contract for life.

Judgment. terms mentioned in the condition; one is an absolute
BURTON, right extending the contract; the other is purely dis-
J. A. cretionary with the company on certain facts being estab-
lished to their satisfaction.

The death of the assured did not terminate the contract any more than the loss of the building in *Salvin v. James*, 6 East 571, and in *McDonnell v. Carr*, Hayes & Jones, 256, terminated the contract; the fact that the subject matter no longer exists has nothing whatever to do with the continuance of the contract.

But upon the other point:—The policy was avoided on nonpayment of the note, unless the suing upon it can be treated as a waiver.

I do not see how we can, consistently with our decision in *McGeachie v. North American Life Assurance Co.*, 20 A. R. 187, hold this to amount to a waiver, unless we are to hold that the provision contained in the application in these words:—"If a note, cheque, draft, or other obligation, be given for the first or a subsequent premium or any part thereof, and if the same be not paid at maturity, it is agreed that any insurance or policy made on this application shall thereupon become null and void, but the note, cheque, draft or other obligation must nevertheless be paid," comes within section 4 of the Ontario Insurance Act, 52 Vic. ch. 32, as a term, condition, stipulation, warranty, or proviso, modifying or impairing the effect of any contract of life insurance, in which case it would require to be set out in full on the face or back of the instrument, forming or evidencing the contract.

I do not see how this can be regarded as in any way modifying or impairing the effect of the contract; it is an agreement in no way affecting the contract, but defining what the rights of the parties shall be in respect of the note so given for the premium. The effect of the nonpayment at maturity is disclosed in a condition which is set out in full upon the back of the policy, and the only object of this collateral agreement is to avoid all doubt about the suing on the note being considered a waiver of the previous forfeiture.

I regret, therefore, that I am unable to find any thing which operated as a waiver of the forfeiture, and I think the appeal must be allowed.

Judgment.
BURNES,
J.A.

OSLER, J. A. :—

I am of opinion, with all respect for the learned trial Judge, that no waiver or estoppel arises out of these proceedings. The effect of the note was to continue the policy in force for two months beyond the month of grace, so that the deceased was insured for three months out of the half-year for which the premium was payable; and had death occurred during that time the policy would have become a valid claim. On nonpayment of the note, however, it became void by the express terms of the condition. But the condition says nothing of the note becoming void. It is, and remains, a contract with the company for which the maker has received, up to the time of its maturity, full consideration. In the absence of an express stipulation that both contracts shall be avoided if default is made in payment of the note, effect must, it seems to me, be given both to the condition and to the note. By the former the policy is expressly declared to be void, but the maker's liability upon the note continues without any stipulation that an attempt to enforce it shall reinstate the policy which had been avoided or simply ceased to be in force by the mere fact of nonpayment.

It is quite consistent with this that acceptance of payment of the note by the company after default should be treated as a revival of the policy; but why should anything short of this be held to have that effect? It is said that it is inconsistent for the company to sue the note, and at the same time say that the policy for the premium on which it was given is forfeited; but that cannot be so if the liability upon the note has not been extinguished by the omission of the maker to pay it, or unless the assertion of a right to payment of the note, whether by

Judgment.

OSLER,
J.A.

a mere demand or by suing it, is to be regarded as an acceptance of it absolutely, *quod* payment of the premium, though the company may never be able to recover anything upon it from the policy-holder. I think the defendant's case must be pushed as far as that. The maker in short has bound himself to pay the note, and the company have stipulated that if he does not pay when it is due the policy shall be void. That is the legal position of the parties. I can not see how the company by asserting their legal right upon the note, waive or are estopped from asserting another legal right, when they have done nothing which would make it fraudulent for them to insist upon it, or how anything short of payment by the insured in his lifetime, accepted by the company, relieves him from the forfeiture or entitles him to say that they have treated the premium as paid, or the forfeiture waived by suing or obtaining judgment on the note.

I refer to *Edge v. Duke*, 18 L. J. Ch. 183, where it was held that the insurance company had not waived a forfeiture incurred by nonpayment of the premium either by demanding payment of it or by bringing action therefor. See also *Ware v. Millville Fire Insurance Co.*, 45 N. J. 177; *May on Insurance*, 3rd ed., sec. 362; *Bunyon's Law of Life Insurance*, 3rd ed., 360.

I cannot agree that the other acts of the company upon which the defendant relies, such as carrying the policy in their books as an existing risk, including it (though not specifically) in the official return of policies in force on the 31st of December, 1891, were any evidence of waiver of the forfeiture. They are all equivocal in their nature, capable of explanation, not intended to influence the conduct of the insured, and not in fact communicated to or known by him: *Insurance Co. v. Wolff*, 95 U. S. 326; *Willmott v. Barber*, 15 Ch. D. 96, at p. 105.

As I hold that the default in payment of the note given for the July premium avoids the policy and that the forfeiture thereby occasioned has not been waived the nonpayment of the January premium is of no consequence.

But upon the two important questions raised with reference to that premium, viz., whether the term "month," in the clause giving a month's grace for payment of the premium, is a lunar or a calendar month; and, secondly, whether a tender of the premium is sufficient if made during the grace, but after the death, I may briefly say, that I think it sufficiently appears from the other parts of the policy, that the term is used in the sense of being a calendar month, because other periods of time are mentioned which are ascertainable only by reference to the latter; and we find calendar months expressly named, e. g., the premiums are payable on the 5th days of July and January in every year, which shews that the calendar year, or "a twelve month," is intended, and not "twelve months;" and the policy speaks of the semi-annual premiums, again implying calendar months, six of which go to the half-year: *Catesby's Case*, 6 Rep. 377. No doubt it is well settled in our law that in a written contract, subject to certain exceptions, the word "month" describes at law a lunar month, unless there is admissible evidence of an intention in the parties using the word to describe a calendar month. The leading case is *Simpson v. Margitson*, 11 Q. B. 23; and see also *Turner v. Barlow*, 3 F. & F. 946; *Hutton v. Brown*, 45 L. T. N. S. 343 (1881), per Fry, L. J.; *Hart v. Middleton*, 2 C. & K. 9; *Lang v. Gale*, 1 M. & S. 111; Stroud's Judicial Dictionary, Tit. Month. But such evidence may be drawn from the context of the instrument; and we may here justly infer that the parties did not mean to employ the term in this particular clause in any other sense than that in which it must be understood in reference to other periods of time which are spoken of, which are made up of calendar months, or which are described by the actual names of such months. It is to be regretted that this distinction between lunar and calendar months should still prevail in our law since the ancient and derivative meaning of the term is obsolete as applied to ordinary business affairs and transactions of life in this country, and the statutory rule as

Judgment.

OSLER,
J. A.

Judgment.

OSLER,
J.A.

given by the Interpretation Act might well be made of general application.

In the United States the common sense rule has generally been adopted: *Sheets v. Selden's Lessee*, 2 Wall. 177, at p. 189; *Gross v. Fowler*, 21 Cal. 393; *Strong v. Birchard*, 5 Conn. 357; *Brewer v. Harris*, 5 Gratt. 285.

The other question seems to me one of some difficulty. The language of the policy is obscure, and though framed in more general terms in some respects than the policies in question in the English cases of *Simpson v. Accidental Death Insurance Co.*, 2 C. B. N. S. 257; and *Pritchard v. Merchants, etc., Life Assurance Society*, 3 C. B. N. S. 622, the present inclination of my opinion is that it must be construed as meaning that payment of the premium must be made in the lifetime of the insured. The clause as to reinstatement which is found in direct connection with the "grace" clause implies the continuance of the life at the end of the month, and to hold that the grace continues after the death to the end of the month involves the absurdity that though the policy has become a claim by death within the month, so that the premium ought to be then a mere matter of account, it will be avoided by the express terms of the provision, and the claim defeated, by the omission of the insured's representatives, who may know nothing about the matter, to pay the premium in cash before the expiration of the month. I doubt if the reference in the first clause of the policy to the deduction of "the balance of the current year's premium, if any" has any thing to do with the case of death during the month's grace. It seems rather intended to provide for a case where the company insure upon a stipulation for a yearly premium which may have been divided into quarterly or half-yearly payments for the convenience of the insured who afterwards happens to die during the quarter or half-year, and then the company deduct the balance of the yearly premium. The undertaking of the company to pay on proof of death during the continuance of the policy does not assist the argument because

the question is whether the policy is continued during the month, if death ensues before payment. If the company had intended to be liable in that event, they could easily have said so. The question is seldom likely to arise since the circumstances must be rare in which a company will think it prudent as a matter of business to raise it. We must, however, be guided by what they have chosen to express by their contract and not by their practice; how general soever that may be, though of this indeed we have no means of knowing. If their intentions are good, they will, now that this ambiguity in their contract has been pointed out, readily find a way to remove it. I must add that I do not wish to be understood as expressing a final opinion on this point, which, though suggested on the hearing, was not really argued. I merely desire to point out that the question is not so absolutely free from doubt as the respondent's counsel asserted it was.

Judgment.

OSLER,
J.A.

There are cases in the American Courts, such as *Worden v. Guardian Mutual Life Insurance Co.*, 39 N. Y. Sup. Ct. 317, which favour the respondent's contention on this point; but the frame and condition of the policies in question there are so different that they cannot be accepted as safe guides in a case like the present.

The appeal must be allowed, and the counter-claim dismissed, on the ground of the nonpayment of the July premium.

MACLENNAN, J. A.:—

The learned Judge held that although by nonpayment of the note at maturity the policy became void by virtue of the condition, the forfeiture had been waived; and, as I understand his judgment, that the waiver was by the proceedings taken to enforce payment of the note. Unless that conclusion of the learned Judge can be supported the appeal on the counter-claim must succeed, and it is not necessary to consider the question upon the premium of January or the sufficiency of the tender of the

OSTROM V. BENJAMIN.

Solicitor—Notary—Services as agent—Conveyancing charges—Taxation—Costs.

A solicitor, who is also a notary, and acting in the latter capacity obtains for a client the allowance of a pension from the United States Government is entitled to charge for his services such sum as may be agreed upon, and is not bound by the statutory regulations affecting solicitors' charges, or liable to have his charges taxed.

The right to tax a solicitor's bill of charges for conveyancing in the absence of a special agreement, considered.

Judgment of the Queen's Bench Division reversed.

Statement.

THIS was an appeal by the plaintiff from the judgment of the Queen's Bench Division.

The plaintiff was described in his statement of claim as a barrister and solicitor residing in and carrying on business in the town of Trenton, and the defendant as a merchant residing in and carrying on business in the city of Toronto. The claim further stated that in or about the year 1887 the defendant represented to the plaintiff that he (the defendant) had entered into an agreement with one Mary Sweet, a claimant for pension from the United States Government, whereby the said claimant agreed to give the defendant \$500 in consideration of his services in or about the procuring of said pension, provided said claim was allowed by said Government, and that he had thereby induced the plaintiff, who relied upon said representation being true, to enter into an agreement whereby the defendant agreed to give to the plaintiff, in consideration of his professional services and disbursements in and about the procuring of said pension, one half of such sum or sums as the said claimant should pay under her said agreement with the defendant, namely, the sum of \$250; and that the plaintiff, in pursuance of the said agreement with the defendant, did render valuable professional services in and about the procuring of said pension for the said Mary Sweet; that the said pension claim was allowed by the United States Government in or about March, 1891, but

that the defendant had never paid to the plaintiff the said Statement.
sum of \$250, or any part thereof, save and except \$12.50.

The plaintiff then claimed payment of the sum of \$237.50. The defence was in effect that the plaintiff acted in the matter as a solicitor and notary, and that the real agreement was that if the pension were procured the plaintiff should receive double his usual fees as solicitor and notary, but that if the pension were not secured, the plaintiff should not make any charge for his services.

The action was tried on the 14th of October, 1891, at Toronto, before ROSE, J., and a jury, who found the facts as to the agreement in favour of the plaintiff, and the learned Judge held that the plaintiff had acted as notary only, and gave judgment in his favour for the full amount claimed.

On motion to the Queen's Bench Division this judgment was reversed, that Court holding that the defendant was a client of the plaintiff within the meaning of R. S. O., ch. 147, sec. 51, and that as there was no written agreement for the plaintiff's remuneration, and as no signed bill of costs had been rendered, he could not recover.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 3rd of February, 1893.

W. Nesbitt, and A. A. Abbott, for the appellant. The agreement in question was in the nature of a partnership to jointly perform certain services and divide the proceeds and the appellant was not in any sense employed as a solicitor but as a notary only, and he did not in fact render solicitor's services. The relationship of solicitor and client never existed between the plaintiff and the defendant, and the statutory provisions as to solicitor's charges do not apply to the case at all: *Att. Gen. v. B. & C. B. & Co.*, 40 L. Cordery on Solicitors, p. 222, *Verob v. Powell*, 2 Q. B. 928; *In re Jones*, L. R. 13 Eq. 555. *In re Richardson*, 2 Ch. Ch. 144.

Argument. *J. C. Hamilton*, and *A. J. Russell-Snow*, for the respondent. The plaintiff describes himself in his claim as a barrister and solicitor, and asks payment for his professional services, and it is now too late for him to contend that he did not act in the matter as a solicitor. The work done was in fact solicitor's work: *In re Inderwick*, 25 Ch. D. 279. The question whether the plaintiff acted as a solicitor or not should have been left to the jury.

W. Nesbitt, in reply.

March 7th, 1893. HAGARTY, C. J. O. :—

I feel great difficulty in this case in agreeing with certain propositions pressed on us ; and first, that the alleged agreement between the plaintiff and the defendant is in any way governed by any statutable provision affecting solicitors' charges, or that it required to be in writing.

The subject matter of the contract does not seem to come under any rule governing a solicitor's fees and charges. If a bill had been rendered setting forth the particulars of the claim and the nature of the services actually rendered, I hardly see how such a bill could be referred to taxation—the services would be such that any competent person could render—the preparing and drawing papers to establish a claim to a pension in a foreign country ; no intervention of a solicitor was required any more than (as suggested by the trial Judge) in the preparation of the necessary papers to obtain a patent of invention or a grant of land under certain Government regulations.

The plaintiff here in his claim apparently describes the work done as professional charges, calling himself a barrister and solicitor. This was naturally urged against his subsequent contention at the trial that his connection with the case was only as a notary.

I am not prepared to hold that his statements in the claim prevail against the facts in evidence or change the nature of the acts done or services rendered. I neither see how he could be required to deliver a bill a month

before action, nor if he did deliver it how or by whom it could be taxed. Even under the widest powers of taxation the character of the work done must be considered. As said by Lord Langdale: "The business must be business connected with the profession of an attorney or solicitor—business in which the attorney or solicitor was employed because he was an attorney or solicitor, or in which he would not have been employed, if he had not been an attorney or solicitor:" *Allen v. Aldridge*, 5 Beav. 401.

Judgment.

HAGARTY,
C.J.O.

That was the case of the charges made by the steward of a manor, who was also an attorney. Taxation was refused. The Court added: "The statute does not authorize the taxation of every pecuniary demand or bill which may be made or delivered by a person who is a solicitor, for every species of employment in which he may happen to be engaged."

It is necessary to look at the state of our law as to taxation.

I had occasion to examine it in 1863, in the case of *Ex parte Glass*, 3 P. R. 138, where I followed a decision of Burns, J., in *In re Lemon and Peterson*, 8 U. C. L. J. 185, and held that a bill exclusively for conveyancing charges could not be referred for taxation. The then law was set out in C. S. U. C. ch. 35, section 27 of which provided that no suit could be brought for fees, charges, or disbursements for business done by any attorney as such, till delivery of a bill, etc.; and by section 28 the party chargeable could apply to have the bill taxed by any officer of the Court in which any of the business charged in the bill was done.

In *In re O'Donohoe*, 4 P. R. 266, Draper, C. J., ordered a bill apparently for conveyancing charges alone to be taxed. He does not notice or discuss *In re Lemon and Peterson*, nor the difficulty pointed out by Burns, J., as to the taxing officer of the Court in which some of the business was done.

The general question is fully discussed in a long article in 6 U. C. L. J. 97; and see the remarks of Richards, J., in *In re Eccles*, same vol. p. 59.

The Imperial Act, 6 & 7 Vic. ch. 73, therein referred to,

Judgment.

HAGARTY,
C.J.O.

at section 57, gives express power to the Lord Chancellor and Master of Rolls to order taxation "in case no part of such business shall have been transacted in any Court of law or equity," our statute having no analogous provision, merely referring to "business done by any attorney or solicitor as such."

Several of the cases referred to in England, where taxation has been ordered in non-contentious business, are under this Imperial Statute.

In 1870 the Imperial Act, 33 & 34 Vic. ch. 28, allowed an agreement in writing between solicitor and client to fix the remuneration under certain restrictions.

The law is further amended by the Act of 1881, 44 & 45 Vic. ch. 44, which enabled the Judges to make rules regulating the remuneration of solicitors as to certain business, and rules were made "in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, *and in respect of other business not being business in any action, or transacted in any Court.*" The taxation of bills of costs was to be regulated by the scale of charges provided.

By R. S. O. ch. 147, following an Act passed in the preceding year, 49 Vic. ch. 20, the old clauses of C. S. U. C. ch. 35 as to taxation are repealed (see sec. 31 *et seq.*)

A written agreement is authorized (sec. 51) and provision is made for rules fixing the scale of remuneration considering the position of the party "for whom the solicitor is concerned in any business," that is whether as vendor or as purchaser, lessor or lessee, mortgagor or mortgagee, and the like, but omitting the words above italicised in the Imperial Act as to other business.

No rules have been made, but section 51 says that with respect to any business to which the preceding part of section 51 relates, whether rules be made or not, it shall be competent for a solicitor to make the agreement as to a fixed sum, and sub-section 4 sanctions an order for taxation, and a consideration of the fairness and unfairness of any such agreement, with power to reduce the amount, etc. See also sub-section 2, section 50.

It seems to me, therefore, that there was no power here either to demand a bill of costs from this plaintiff, or to obtain an order for taxation.

Judgment.

HAGARTY,
C.J.O.

It may be, and probably was, that his being a solicitor was the reason for this defendant applying to him to prepare the papers required for obtaining the pension from the United States government. But I am unable to hold that the nature of the business transacted can come within the definition of business connected with the profession of a solicitor, even if our law were as comprehensive as that of England on this subject.

Our Legislature has designedly (as we must assume) restricted the operation of the Imperial Acts to conveyancing business. The language of the latter is substantially followed till we come to the omitted words.

I cannot hold any of the work or business done by the plaintiff to come under the head of conveyancing business as described in section 51 of our Act.

The large words used in the Imperial Act are omitted.

In the view I take of the case I do not attach much importance to the objection that it should have been left as an issue of fact to the jury whether defendant retained plaintiff as a solicitor. The question was not specifically pressed.

At the end of the case counsel for defendant said to the Judge, "the relation of solicitor and client you did not state to the jury." The Judge remarked "that it seemed to him to be a question of law, and that it seemed there was no question of fact as to that."

It does not appear to have been further pressed at the trial.

I feel compelled to allow the appeal. I feel some regret, as I think it would be better, as well for the reputation of clients as for the reputation of solicitors, that all charges or fees claimed for services in drawing documents of all kinds for use at home or abroad should be open to the supervision of the Courts, as in ordinary cases of contentious business or conveyancing.

Judgment. BURTON, J. A. :—

BURTON,
J.A.

It would be a new departure in this Court if we were to hold parties conclusively bound by their pleadings.

We had a notable instance not long since in which the plaintiff contended that the facts of the case were not as presented in the statement of claim, but as set forth in the defence; whilst the counsel for the defendants on the other hand contended that the truth was to be found not in the defence, but in the statement of claim, and the judgment proceeded upon facts not alleged by either and scarcely referred to on either side upon the argument.

No doubt a party who makes a particular allegation in his pleading has that additional difficulty to grapple with in the event of his subsequently basing his claim or defence on a different ground, but these are difficulties to be dealt with at the trial, and after a jury has once dealt with them at the trial, are not likely to be disturbed.

It is said that the description in the commencement of the statement of claim is a mere compliance with the rule which requires the occupation of the parties to the suit to be stated, in the same way as the defendant is described as a merchant, and is not necessarily to be read into the description of the services rendered under the agreement which are described, and not inaptly described, as professional, without implying that they were rendered in the character of barrister or solicitor.

This may or may not be so; but from the evidence at the trial, and upon the defendant's own admission, the business was not done as a solicitor, but under a special agreement in his character as a notary.

The learned Judge was evidently of opinion that if the disputed facts were found by the jury in a particular way, then upon that finding no question as to the relationship of solicitor and client arose, and he stated that view to counsel in answer to his objection that he had not explained to the jury the relationship of solicitor and client; to which the Judge replied: It seems to

me to be a question of law—that there was no question of fact as to that—in which the counsel apparently acquiesced, and did not request that any such question should be submitted.

Judgment.

BURTON,
J.A.

If, notwithstanding that expression of opinion, counsel still contended that that was not his view, but that he still desired that question to be submitted to the jury, that was the time to do so, and he cannot afterwards object that it was not presented to the jury as a question of fact: See *Brown v. Storey*, 1 Scott N. R. 9; *Reeve v. Bird*, 1 C. M. & R. 31; *Hazeldine v. Grove*, 3 Q. B. 997; *Morgan v. Couchman*, 14 C. B. 100.

I have read the judgment in the Divisional Court with great care, and I find myself at a loss to see the precise ground on which they set aside the judgment. If it is, as I understand my brother Falconbridge's judgment, that the agreement is void under the Solicitors' Act, they would seem to be usurping the functions of the jury in holding that the services were rendered as a solicitor, and I must confess I do not see the application of such cases as *Kennedy v. Brown*, 13 C. B. N. S. 677, to this action.

I think there was evidence sufficient, if the jury believed it, to warrant the plaintiff's recovery, and if true the defence is far more unconscionable and unmeritorious than the claim of the plaintiff.

I am of opinion that the findings of the jury and the judgment of the trial Judge thereon should not have been interfered with.

OSLER, J. A. :—

In the judgment appealed from, which reverses the judgment at the trial, I think, with all deference, that too much stress has been placed upon the manner in which the plaintiff described himself and the character of his services, in the statement of claim. No doubt he there describes himself in the first paragraph as a barrister and solicitor, and in the second alleges that the special contract

Judgment.

OSLER,
J.A.

sued upon was that he should be paid in a certain event \$250 for his professional services in and about the procuring of the pension as therein mentioned. These services as described and proved, though services which a barrister or solicitor could have rendered if he also happened to be a notary, were also such as could be rendered by a person who was only a notary; the business was not necessarily connected with the profession of a barrister or solicitor, and if it made any difference in the plaintiff's right to recover, in what character he was really employed, that was a question to be determined in the action upon the evidence and not as it happened to have been stated in the statement of claim. The evidence appears to me fully to support the judgment of the trial Judge that the plaintiff was employed to do the work in question as a notary and not as a solicitor. The defendant so states it in his examination for discovery, and reiterates it in the most deliberate manner on his cross-examination at the trial. I think it must in all fairness be considered that the plaintiff says so too both in his examination and cross-examination. It does not strike me that there was any attempt to equivocate or to avoid giving a direct answer to the question. If the defendant's counsel was not satisfied with the answer given, he might have pressed for a fuller answer; but I think that is all that can be said. The doubt I have felt is whether the question of fact as to the character of the employment should have been left to the jury. On the whole I do not see how the defendant can object to the way in which the learned Judge dealt with it, as there was really no difference between himself and the plaintiff on that point. He could hardly complain that the jury have not had an opportunity of determining the fact to be otherwise than as he himself stated it. Therefore it is no defence to the action that no bill was delivered before action, for, as pointed out in many cases, a solicitor may have a legal claim against another for services, but it by no means follows that it is in respect to his character as solicitor; there must be established between them in re-

spect to the business done the relation of solicitor and client: *Allen v. Aldridge*, 5 Beav. 401; *In re Osborne*, 25 Beav. 353, 359; *In re Inderwick*, 25 Ch. D. 279.

Judgment.

OSLER,
J.A.

In the case of *In re Jones*, L. R. 13 Eq. 336, cited in the judgment below, the bill was referred because the form of the bill rendered shewed he had done the work sued for, or part of it, as solicitor; whereas in this case the business and services to be done by the plaintiff were not to be done by him as solicitor, and therefore he is entitled to recover upon the special contract proved. Whether, if it had been established that the work had been done as solicitor, it would have been necessary to deliver a bill therefor before action, or whether if delivered it would have been taxable, or whether as solicitor an agreement such as is now in question could have been validly made by the plaintiff with his client, are questions which do not arise in this action. I do not think it can be said that the business was in any sense conveyancing business within the meaning of sections 50 and 51 of the Solicitors' Act, R. S. O. ch. 147, so as to have made it necessary in order to recover upon a special agreement, that the agreement should be in writing. *In re Newman*, 30 Beav. 196, shews that an agreement to pay a fixed sum for costs for business to be thereafter done, *i. e.*, for costs not incurred, is illegal, and the provisions referred to only enable a valid agreement of that nature to be made in respect of conveyancing business, and, in respect of that, only when it is in writing. To the same effect are *O'Brien v. Lewis*, 32 L. J. Ch. 569; *Pince v. Beattie*, 32 L. J. Ch. 734; *Saunders v. Glass*, 2 Atk. 296.

I do not wish to be understood as being party to the view that a solicitor's conveyancing bill was not, or is not, taxable. There are some decisions to that effect I am aware: *In re Lemon and Peterson*, 8 U. C. L. J. 185, *per Burns*, J.; *Ex parte Glass*, 3 P. R. 138, 140. But there are also authorities to the contrary: *In re O'Donohoe*, 4 P. R. 266, *per Draper C. J.*, and *In re Eccles*, 6 U. C. L. J. 59. The

Judgment.

OSLER,
J.A.

various Acts respecting short forms of conveyances, leases and mortgages, assume that such a bill is taxable, and so also do sections 50, 51, and 52 of the present Solicitors' Act, R. S. O. ch. 147. If it was not taxable before that Act I see nothing in the Act which makes it taxable now, where there has been no special agreement, or which removes the difficulty which was thought so insuperable in *In re Lemon and Peterson*, 8 U. C. L. J. 185.

In *Green v. Hassel*, Sayer's Reports 233 (1753), the Court of King's Bench made no question as to their jurisdiction to refer a bill for conveyancing to taxation. See also *In re Richardson*, 3 Ch. Ch. 144.

For the reasons already given I think the appeal must be allowed.

MACLENNAN, J. A. :—

I agree.

Appeal allowed with costs.

IN RE GOULD V. HOPE.

*Prohibition—County Court—Sheriff—Interpleader—Rules 1141 (a),
1141 (b).*

A sheriff sued in the County Court by an execution debtor for \$100 damages, the value of implements seized and sold by the sheriff without any special direction from the execution creditor and alleged to be exempt, cannot obtain in that Court an interpleader order directing the trial of an issue between the execution debtor and the execution creditor, to settle whether the implements were exempt or not. The sheriff acts at his own peril in granting or refusing the exemption.

Prohibition granted, the County Court having no jurisdiction to make such an order.

Judgment of the Queen's Bench Division, 21 O. R. 624, reversed, MACLENNAN, J. A., dissenting.

THIS was an appeal from the judgment of the Queen's Bench Division, reported 21 O. R. 624.

The action was brought in the County Court of the county of Lennox and Addington by one Peter Gould, a judgment debtor, against William Hope, sheriff of the county of Hastings, to recover from him the sum of \$100.

The endorsement on the writ was as follows:—"The plaintiff's claim is for damages against the sheriff of the county of Hastings for selling the exemptions of the plaintiff." In the statement of claim it was alleged that the sheriff, under a writ of *fieri facias* issued in an action in the Queen's Bench Division of the High Court of Justice in which W. R. Brock & Co., were plaintiffs, and Peter Gould was defendant, had seized and sold certain tools and implements of the judgment debtor though exempt to the value of \$100, and had refused to recognize his claim to \$100 of the proceeds thereof, and the plaintiff claimed "\$100 damages."

The sheriff applied in the County Court of Lennox and Addington, on notice to the judgment debtor and W. R. Brock & Co., and obtained an order staying all proceedings in the action against the sheriff; directing him to pay into Court the balance of the sum of \$100 made by him under the writ in question, less his taxed costs; and order-

Statement. ing the plaintiff and W. R. Brock & Co., and such other creditors having executions in the hands of the sheriff as might agree to contribute *pro rata* to the expenses of contesting the claim of the plaintiff, to proceed to the trial of an issue in the County Court in which the plaintiff should be plaintiff, and W. R. Brock & Co., and such execution creditors, defendants, to try the right to the \$100 in question. At this time there were several other executions in the sheriff's hands.

Upon the application of W. R. Brock & Co., an order for prohibition was made by GALT, C. J., but this order was reversed by the Queen's Bench Division. On the application a number of letters, from the solicitors for the execution creditors to the sheriff of Hastings in connection with the sale, were produced, but it is not necessary to set them out as the Court held that they did not affect the legal position.

The execution creditors appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 20th and 23rd of January, 1893.

A preliminary objection that no appeal lies in a case of this kind without leave, and that leave had not been granted, was overruled, the Court, without deciding the point, granting leave if leave were necessary.

H. Cassels, for the appellants, The defendant Hope is sued, *quod* sheriff, by Gould, the execution debtor, for wrongs alleged to have been done by him in the performance of his duty as sheriff, and the action is for damages and not for a specific sum of money in the sheriff's hands. The appellants have nothing whatever to do with the plaintiff's action against the sheriff or with the sheriff's alleged wrongdoing. Their only connection with the sheriff is as execution creditors having a writ of execution in his hands against the goods and chattels of the plaintiff Gould. They do not now make and never have made any

claim to the damages sued for in this action. Under these circumstances, the sheriff's application for relief is governed by Consolidated Rule 1141 (b), and not by Consolidated Rule 1141 (a). No application can be made under Consolidated Rule 1141 (b) because, if it be held that the appellants are making claim to the damages sued for in this action, the other person making claim (the plaintiff Gould), is the person against whom the process issued. Even if there were otherwise jurisdiction to make an interpleader order under the circumstances in evidence in this case, it could not be made by the County Court Judge, but could only be made by a Judge of the High Court. The appellants' writ of execution is issued out of the High Court: Consolidated Rule 1156. There are many other writs of execution against the plaintiff Gould in the sheriff's hands, and if the sheriff can make application at all he should have given notice to all the execution creditors: Consolidated Rule 1155. There is no reason why the appellants should be singled out and put to great expense and required to give notice to the other execution creditors. The learned County Court Judge has not found that he had jurisdiction, and the Court will not assume that he had when the evidence on the motion before him proves that he had not. Even had the learned County Court Judge found that he had jurisdiction, the Court will not allow him by reason of that finding to assume a jurisdiction not in reality possessed by him, inasmuch as the having or not having jurisdiction does not depend upon any finding on disputed facts. There is in this case no dispute as to the facts, and jurisdiction in interpleader is wholly statutory. The learned County Court Judge could not give himself jurisdiction and then take away the legal rights of the appellants in the exercise of that assumed jurisdiction: *In re Long Point Co. v. Anderson*, 18 A. R. 401; *Re Sims v. Kelly*, 20 O. R. 291.

Argument.

C. J. Holman, for the plaintiff.

Aylesworth, Q. C., for the respondent. The order of which the appellants complain was made in an ordinary

Argument. action in the County Court; the County Court had full and complete jurisdiction over that action, and the Judge of the County Court had full jurisdiction to entertain the application of the defendant made in that action and to stay proceedings upon such terms as were just. No question of the propriety or impropriety of the County Judge's order can be considered in these proceedings: *In re Long Point Co. v. Anderson*, 18 A. R. 401. The appellants in this case are seeking to apply the remedy of prohibition to a purpose altogether foreign to its proper use. Their motion is really an appeal from the order of the County Judge, and its object is to obtain from the High Court the order which the appellants think the County Judge ought to have made. Their notice of motion asks, and their order as issued in Chambers directs, that the County Court Judge be restrained from making any other order in the matter than the particular order which the appellants desire. Prohibition does not lie for such a purpose. The application to the Judge of the County Court was made by this respondent as being the defendant in the action and under the provisions of Rule 1141 (a). The circumstance that this respondent happens to be a sheriff, and that he has been sued in consequence of something he has done as sheriff, does not disentitle him to the ordinary rights of any defendant if his case is within the provisions of Rule 1141 (a). The claim made by the respondent Gould is not a claim in trespass for the recovery of uncertain and unliquidated damages, but is a claim for the definite sum of \$100 in money, the proceeds of the sale of his exempted goods, in lieu of the tools and implements of his occupation themselves, as appears by his statement of claim. The appellants are claiming from this respondent Hope under their writ of execution the same sum of \$100. Their solicitors, by their letters of the 1st and 3rd June, distinctly refuse to recognize any claim of Gould to exemptions, and during the present proceedings, both before the Judge of the County Court and before the Divisional Court, the appellants have by their counsel adhered to the same course.

Upon these facts appearing before him, and upon the material in evidence, the Judge of the County Court found, as he had the jurisdiction to do, that this defendant Hope was under liability for a debt or money, in amount \$100, "for or in respect of which he is, or expects to be, sued by two or more parties making adverse claim thereto." The conclusion of the County Judge in this respect can be reviewed only upon an appeal therefrom, and not upon application for prohibition. Argument.

H. Cassels, in reply.

March 7th, 1893. HAGARTY, C. J. O.:—

Our Rule 1141 is the same as the rule in England, Order 57 (1883). See Cababé on Interpleader, 2nd ed., p. 147. As that learned author says, p. 7, it confers the right of interpleading upon two classes of persons: 1st, Ordinary stakeholders and persons in the nature of stakeholders; 2nd, Sheriffs and like officers of the Court.

I must say, with much respect for those who hold a different opinion, that I am wholly unable to understand how a sheriff sued by an execution defendant for his alleged tortious act in seizing goods which the law forbade his seizing, can possibly be regarded as in any respect approaching to the character of a stakeholder, and as coming within the language of clause (a) as a person liable "for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties making adverse claim thereto."

His counsel argues that the \$100 of money claimed by Gould may be held as also claimed by the execution plaintiffs.

This, I think, is a fallacy. The statute gave Gould exemption to the extent of \$100, which amount he makes the measure of his damages for the sheriff's wrongful act. The claim is neither more nor less than for alleged misconduct on the sheriff's part. No execution creditor has any specific claim to that money. Their

Judgment. remedy is against the sheriff if he fail to do his duty in endeavouring to realize on the execution.
HAGARTY,
C.J.O.

I cannot distinguish the case from a claim by Gould, that the sheriff's officer assaulted him, and took by force \$100 out of his pocket, or under *fi. fa.* goods seized fixtures attached to the freehold, or anything else exempted.

I think this is a matter which can only be settled between Gould and the sheriff. I cannot see how by incurring liability to an execution debtor arising from an unlawful exercise of authority in the execution of process, he can legally call upon the execution plaintiff to contest the matter in his stead, and relieve him from responsibility.

The next section of the order specially provides for the case of sheriffs executing process, and forms, as I conceive, the proper, if not the only, course of proceeding for those officials in all matters arising from their actions under such process, where third parties interpose.

It was hardly contended that the decision could be upheld under this section (b).

There are cases where the sheriff may interplead where the judgment debtor claims the goods, not in his own right, but in some one else's right, as executor or trustee, etc: Cababé on Interpleader, 2nd ed., p. 36; Atkinson's Sheriff Law, 6th ed., p. 182; Churchill on the office of sheriff, p. 149.

Lord Denman says, in *Fenwick v. Laycock*, 2 Q. B. 108: "The Act did not mean to protect the sheriff where the resistance was to the writ itself, *i. e.*, where the party in the cause objected to any execution on his own goods: for there the process itself, properly executed, would be his defence."

This is perhaps one of the earliest cases where it was held that interpleader might be granted where the execution debtor held as executor or trustee, etc.

I do not think that anything will turn on Rule 1156, which provides for the application being made to the Superior Court, where there were executions both there

and in the County Court. We are not informed here whether any writ against Gould's goods from the County Court was in the sheriff's hands. Gould's suit in which the application was made, was of a wholly different character, an action against the sheriff for a tort.

Judgment.
HAGARTY,
C.J.O.

For the disposal of this appeal, I do not think that it is necessary to consider the plaintiffs' letters in which they question Gould's right to exemptions.

Before the final sale under the *ven. ex.* these opinions were expressed. After the sale the execution plaintiffs declined giving any instructions to the sheriff in the matter.

From an early period a marked distinction has been drawn in the legislation governing interpleaders between ordinary individuals, as stakeholders, and sheriffs. This will appear from 7 Vic. ch. 30 (1843). The general protection is given to persons sued in actions of assumpsit, debt, detinue, or trover; and section 6 recites the difficulties of sheriffs in executing process when claims are made by persons other than the person against whom the process is.

C. S. U. C. ch. 30 is to the like effect, placing interpleader by sheriffs on a different arrangement and footing; and this distinction is thenceforward carried down through all the legislation and the orders now covering the subject.

I am of opinion that neither under section (a) or (b) could such an application be entertained; and that the learned Judge below had no jurisdiction to make the proposed or any other order forcing the appellants to interplead.

In *In re Long Point Co. v. Anderson*, 18 A. R. 401, we had occasion to consider the law as to jurisdiction.

I cannot think that because he had jurisdiction to try and determine the case of *Gould v. Hope*, he had thereby any right over the appellants.

BURTON, J. A.:—

I quite concede that there may be many cases in which, although the money in the sheriff's hands may have been realized by him under legal process, his relief is not

Judgment.
BURTON,
J.A.

confined to Rule 1141 (b), but that he may invoke the assistance of Rule 1141 (a); but I think, with great deference, that this is not a case for interpleader at all, either under the rules or otherwise; that the learned County Court Judge had no jurisdiction to entertain the application, and that a prohibition was properly granted to prevent his making the order he proposed to make.

I think that under the Execution Act, R. S. O. ch. 64, the sheriff acts at his peril in granting or refusing the exemption, and that the Legislature has not thought proper, either from inadvertence or designedly, to extend to him the right to interplead in such a case.

In the present case, he has exercised his judgment and refused to recognize the execution debtor's claim to the exemptions, and the latter now sues the sheriff for damages for selling the goods which he claims were exempt.

It is a confusion of terms, as it seems to me, to speak of this being any thing but an action for damages; it is true the plaintiff's recovery is limited to \$100.

The relief under Rule 1141 (a) is confined to cases where the applicant is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties. He may have made a mistake and rendered himself liable to an action for selling this property; but if so, he is liable to no one but the plaintiff in respect of that act.

It may be that when he is compelled to return Brock & Co.'s *fi. fa.*, he may deduct this \$100, and his return may be contested; but the very fact that they may try the truth of that return in the High Court, where a different result might be arrived at from that proposed in the order which has been prohibited, shows the inconvenience of such a proceeding.

There is, however, here no common thing or property claimed by two persons. Brock & Co. do not claim these damages. Whether the sheriff is liable to Gould for damages will depend upon whether the goods were exempt from execution or not.

I think it clear that the County Court Judge had no jurisdiction to make the proposed order ; and that the judgment of the learned Chief Justice of the Common Pleas Division should be restored.

Judgment.
BURTON,
J.A.

OSLER, J. A. :—

The question is, not whether the County Court Judge had jurisdiction to make an order to stay proceedings in a suit pending before him in his own court, but whether at the instance of the defendant who is sued as sheriff for a trespass committed by him in the execution of a writ of *fi. fa.* goods issued out of the High Court at the writ of Brock & Co. against the plaintiff, he had jurisdiction in a summary way to bring Brock & Co. before him, and to direct an interpleader issue between the execution creditors and execution debtor (Gould), to try the question whether the goods which had been so seized and sold by him under the *fi. fa.* were exempt from execution.

With all deference, I am of opinion that he had no such jurisdiction.

The jurisdiction of the County Court in interpleader is statutory, as, of course, it has always been : R. S. O. ch. 47, sec. 19, sub-sec. 6. " In interpleader matters as provided by the rules respecting interpleader."

The general rule which provides when relief by way of interpleader may be granted, is Consolidated Rule 1141, which is divided into two branches.

(a) Where the person seeking relief is under liability for any debt, money, goods, or chattels, in respect of which he is, or expects to be, sued by two or more parties making adverse claim thereto.

Rule 1143 provides that the applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin.

If these were the only provisions on the subject of interpleader, and the County Judge had held that the sheriff was entitled to relief thereunder, he might or

Judgment.

OSLER,
J.A.

might not be erring in point of law, but I cannot say he would be exceeding his jurisdiction. The remedy of the party objecting to an order made under such circumstances would be only by appeal.

The sheriff's right to interplead is, however, expressly provided for by clause (b) of Rule 1141.

"Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels, lands or tenements, taken or intended to be taken in execution under any process, or under an attachment against an absconding debtor, or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued."

This clause defines and limits the right of the sheriff to relief by way of interpleader in claims arising out of execution of process by him.

It excludes him from clause (a) by making special provision for his case, and by prescribing the conditions or cases in which he may obtain relief.

Being a sheriff, and applying as such for relief in consequence of a claim made to goods taken in execution by him under process, he must bring himself within those conditions; and unless he does so, the jurisdiction of the County Court to make an interpleader order on his application does not arise.

If the Judge has assumed to make the order under clause (a), he is giving himself jurisdiction by a wrong construction of that clause, his sole jurisdiction being under (b), and therefore may be prohibited.

I do not think any case can be found in which the sheriff has been held entitled to file a bill of interpleader to defend himself from adverse claims arising out of the execution of process at law.

His right to do so was denied by Lord Eldon in *Slingsby v. Boulton*, 1 V. & B. 334, on the plain ground that he was obliged to put his case upon this, that as to some of the defendants he was a wrongdoer; and so the rule is laid

down in Story's Equity Jurisprudence, 13th ed., vol. 2, p. 152; Pomeroy's Equity Jurisprudence, vol. 3, p. 353, *note*. And it seems not to have been without some doubt and fluctuation of opinion, that he was given relief in equity in executing process issued out of that Court, when the remedy by way of *fi. fa.* was given to it: *Rock v. Cook*, 2 Ph. 691; *Tufton v. Harding*, 6 Jur. N. S. 116; *Dutton (or Dalton) v. Furness*, 35 Beav. 46; S. C. 12 Jur. N. S. 386; *Hale v. Saloon Omnibus Co.*, 4 Drew. 492. Ultimately, however, I think the sheriff's right to relief to the extent given by the Interpleader Act at law, seems to have been conceded and administered by Courts of Equity, as it was in our Court of Chancery, when the remedy by way of *fi. fa.* was given to that Court. See *Gourlay v. Ingram*, 2 Ch. Ch. 238; *Walker v. Niles*, 3 Ch. Ch. 59.

It is difficult to see how the sheriff's right to relief can have depended upon the general principles on which Courts of Equity went in granting relief by way of interpleader, as enunciated by the Lord Chancellor in *Crawshay v. Thornton*, 2 M. & Cr. 1, as he is not in ordinary cases a mere stakeholder, but is necessarily as to one of the adverse claimants a mere wrongdoer.

Child v. Mann, L. R. 3 Eq. 806, is a case where the sheriff in executing a *fi. fa.* issued out of the Court of Chancery, found the goods or their proceeds claimed by the assignee in bankruptcy, and he was held to be entitled to relief on a bill of interpleader, just as he would have been at law in a like case upon a summary application under the Interpleader Act. Sir John Stuart, V. C., does, indeed, there, erroneously as I think, describe the sheriff as a stakeholder, and says the case is within *Crawshay v. Thornton*, 2 M. & Cr. 1. Perhaps the facts of the case made a slight difference in the sheriff's position, but the judgment is put upon the ground that the sheriff "acted under a peremptory order of the Court to make a return to the writ of *fi. fa.* The sheriff complied with that order, and then he filed this bill of interpleader because there were conflicting claims against him."

Judgment.

 OSLER,
J.A.

Judgment.

OSLER,
J.A.

Ex parte the Sheriff of Middlesex, In re England, L. R. 12 Eq. 207, is very close to the present case. There one Saul had recovered judgment against England, and had issued execution and levied his goods under *fi. fa.* in a common law action. The debtor proceeded under the Bankruptcy Act, 1869, for a liquidation by arrangement with his creditors, and a resolution was passed, confirmed, and duly registered, to accept a composition. Thereupon he caused a notice to be served upon the sheriff, requiring him to withdraw from possession, contending that the effect of the proceedings was to entitle him to have his goods again free from the writ. The execution creditor refused to permit the sheriff to withdraw, and ruled him to return the writ; and the debtor brought an action of trespass against him for retaining the goods. The sheriff applied to the Court to restrain these proceedings, and to decide upon the rights and priorities of the parties, and for directions as to retaining or withdrawing from the goods in his possession.

Counsel for the sheriff admitted that the Interpleader Act was inapplicable, and that the sheriff could get no protection under it, but he contended that the Court had jurisdiction to relieve him under sections 65 and 72 of the Bankruptcy Act.

Sir James Bacon, Chief Judge in Bankruptcy, said that the application was properly made under the provisions of the Bankruptcy Act; and added: "Indeed, there appears to be no other course for the sheriff to pursue, since it is clear that there can be no proceedings by way of interpleader in which the rights of the parties claiming, could be tried; and, even if there were, the sheriff may well ask this Court to exercise its jurisdiction, *i. e.*, in bankruptcy, in a matter which has arisen solely out of the proceedings in this Court."

This case appears to me to support the view that there was no general jurisdiction in equity to give relief to the sheriff under such circumstances as have arisen in the present case. If there was, it might be successfully

argued that the sheriff could maintain the jurisdiction of the County Court to proceed under clause (a) of Rule 1141. Failing that, the sole jurisdiction is under clause (b), and the conditions for its exercise are plainly absent. For these reasons, I must, with all deference to the Court below, concur in allowing the appeal.

The sheriff is not without some remedy, at all events as to any action by the execution creditors, as is pointed out in Archbold's Practice, vol. 2, pp. 1401-2, ed. of 1866.

Judgment.

OSLER,
J.A

MACLENNAN, J. A. :—

The origin of the two parts (a) and (b) of Consolidated Rule 1141, relating to interpleader, is sections 1 and 6 of the Imperial Act, 1 & 2 Wm. IV., ch. 58, which were adopted here without any substantial alterations by the Act of the former Province of Canada, 7 Vic. ch. 30.

As the law stood in the revise of 1877, it was provided by chapter 43, sec. 19 (b), that the County Courts should have jurisdiction in interpleader matters, as provided by the Interpleader Act, and by that Act, ch. 54, sec. 2, it was provided that in case after declaration and before plea, any defendant sued * * in any County Court in any action of assumpsit, debt, detinue, or trover, applies to such court, and shows * * that the right to the subject of the suit is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, * * the court might grant relief by interpleader. Section 10 provided for the case of claims made against sheriffs or other officers, to property or proceeds thereof, by persons other than the persons against whom the process issued.

The Judicature Act made no change in these sections, but by 44 Vic. ch. 7 (O.), provision was made for trying in the County Courts all cases of interpleader where the execution or the value of the goods in question was under \$400; and so the law remained until the revise of 1887, and the new Consolidated Rules, when it was cast into the form in which we have it at the present time, following

Judgment. the changes made in England by Order 57, Rule 1 (a) and
MACLENNAN, (b).
J.A.

The first question which arises is whether, assuming the present case to be within the language of Rule 1141 (a), the plaintiff was entitled to apply for relief to the County Judge. From the passing of the original Act until the new rules, the law was express that the person sued could apply in the Court in which he was sued, whether it was in the Superior Court or in the County Court; but the new rule is silent on that point. Formerly he could not apply until he was sued; the application had to be made between declaration and plea. Now, however, he may obtain relief if he is, or expects to be sued. Here the applicant was sued in the County Court, and he applied for relief in that action. There is nothing express in the rules authorizing that to be done. The County Courts Act, R. S. O. ch. 47, sec. 19 (6), declares that the County Courts shall have jurisdiction in interpleader matters as provided by the rules respecting interpleader. When we examine the interpleader rules, we find them divided into three classes: (I.) Generally; (II.) Interpleader in County Courts; and (III.) Interpleader by bailees and carriers. There seems to be nothing in the rules as to class II. to authorize applications under 1141 (a) to be made to a County Court; and in *Re Anderson and Barber*, 13 P. R. 21, the learned Chancellor decided that there was no jurisdiction in the County Court, although the applicant had been sued in that Court. I gather from the report of the case that the only contention made before him was, that the rules in class II. gave jurisdiction. In deciding that they did not do so, I think he was right. But the question remains whether the jurisdiction which undoubtedly existed before the revise of 1887, and the substitution of the rules for the old Interpleader Act, has been taken away or lost. The Act relating to the Revised Statutes, 50 Vic. ch. 2, sec. 9, (1), (3), declares that they shall not be held to operate as new laws, but merely as a consolidation, except where the provisions are not in effect the same. There is certainly no

express repeal of the former jurisdiction of the County Court; and I think it may still be found in the rules in class I. The Rule 1141 (a) provides for cases in which the party is, or expects to be, sued for a debt, money, goods, or chattels, and suits of that kind may be brought in the County Court. Then rule 1142 says, the applicant must satisfy the Court or a Judge by affidavit, etc. Rule 1144 says, that where the applicant is a defendant, the application may be made at any time after service of the writ of summons; and by Rule 1146, that if it is made by a defendant in an action, the Court or Judge may stay all proceedings in the action. I think it cannot be denied that these rules apply to proceedings under Rule 1141 (a), as well as under Rule 1141 (b); and that when the application is under Rule 1141 (a) the Court referred to is the Court in which the action has been brought, whenever, at all events, that is the case, whether it be the High Court or County Court.

Judgment.

MACLENNAN,
J.A.

I, therefore, think that if this case is within Rule 1141 (a), the application for relief was properly made to the County Court.

Then, as to the other question. It is quite clear that this case is not within Rule 1141 (b), for the reason that the claim is not made by a person other than the person against whom the process issued, but by the judgment debtor himself. Then does it come within Rule 1141 (a)?

It was contended that because the question is concerning the proceeds of goods taken in execution, it must either come within Rule 1141 (b), or it is a case wholly unprovided for; but I do not see why that should be so. As I understand it, Rule 1141 (a) is general, and applies to any person under liability for any debt, money, goods, or chattels for which he is, or expects to be, sued by two or more parties making adverse claim thereto. It is plain, I think, that if Rule 1141 (b) did not exist, Rule 1141 (a) would include this case. The sheriff is under liability for this sum of \$100, and he is sued for it by the plaintiff, and he expects to be sued for it also by Brock & Co., and the

Judgment. rule is made applicable to all persons who are in that situation, and necessarily includes sheriffs and other persons charged with execution process.
MACLENNAN,
J.A.

But then it is said that Rule 1141 (b) makes special provision for sheriffs, and that by implication they must be excepted from Rule 1141 (a), because the Legislature could not have intended to make a double provision for the same class of cases. The cases for which special provision is made, must be held to be excepted from the general class.

That no doubt is the rule, but what is the extent of it? The proposition is, that the case for which special provision is made, must be excepted from the general provisions; and it follows, I think, that the exception cannot be wider than the special provision. Now it is admitted that, although the present applicant is a sheriff, this particular case is not provided for by Rule 1141 (b), and therefore the reason for excluding it from the operation of Rule 1141 (a) fails. Rule 1141 (b) does not govern all applications by sheriffs, nor all applications by them in respect of property taken or intended to be taken in execution, but it is confined to cases of that kind, where claims are made by persons other than the debtor; and I think the only cases excluded or excepted from the operation of Rule 1141 (a), are those which are specially described in Rule 1141 (b).

It may be said that, if such a wide construction is given to Rule 1141 (a), there was no need for Rule 1141 (b) at all. But I do not think so. The cases provided for by Rule 1141 (a), are where the applicant is, or expects to be, sued by two or more parties. When a sheriff makes a seizure, and the goods are claimed by a third person, the sheriff may not be able to say that he expects to be sued by the execution creditor. The latter may decline to say anything, leaving it to the sheriff to act on his own responsibility; and unless the sheriff could say and shew that he was, or expected to be, sued by two or more persons, he could not get relief under Rule 1141 (a). As the law formerly stood, a party other than a sheriff, etc., had to shew that he had actually

been sued by one person, and had been, or expected to be sued by another for the same thing, to entitle him to relief ; under the new rule, he may apply before any action is brought if he merely expects to be sued by two or more.

Before the statutes the only remedy in the nature of interpleader was in the Courts of Equity. In *Slingsby v. Boulton*, 1 V. & B. 334, Lord Eldon refused relief to a sheriff as between the claim of an execution creditor and a third person, claimant of the goods seized. In *Crawshay v. Thornton*, 2 M. & Cr. 1, Lord Cottenham took a much wider view of the jurisdiction of equity, and effect was given to that view by Sir John Stuart, V. C., in *Child v. Mann*, L. R. 3 Eq. 806. That was a suit in Chancery, brought by a sheriff for relief by interpleader against an execution creditor and the assignee in bankruptcy of the debtor ; and it was contended that relief ought to be refused on the authority of Lord Eldon's decision in *Slingsby v. Boulton*, 1 V. & B. 334 ; and also because the sheriff could have applied under section 6 of the Interpleader Act. A decree of interpleader was granted, however, on the authority of *Crawshay v. Thornton*, 2 M. & Cr. 1.

I am, therefore, of opinion that this is a case in which, if the facts warrant it, the sheriff is entitled to relief under Rule 1141 (a), and that the application was properly made to the Judge of the County Court.

In my judgment the appeal should be dismissed.

Appeal allowed with costs,
MACLENNAN, J. A., *dissenting.*

CENTRAL BANK OF CANADA V. ELLIS ET AL.

Attachment of Debts—Salary not yet Due—Rule 935—Salary of Police Magistrate—Public Policy.

The salary of a judgment debtor, not actually due or accruing due at the time of service of the attaching order, but which may thereafter become due, cannot be attached to answer the judgment debt; and the enlarged provisions of Rule 935 have made no difference in this respect. The salary of a police magistrate appointed by the Crown, but paid by a municipality, cannot, on grounds of public policy, be attached; HAGARTY, C.J.O., expressing no opinion on this point.

Statement.

THE plaintiffs on the 21st March, 1888, recovered judgment in the County Court of the county of York against the defendants, P. Ellis and Arthur Glen, for \$333.72 debt, and \$22.28 costs.

On the 30th November, 1892, an order was made by the Judge of the County Court in Chambers, upon the application of the plaintiffs, judgment creditors, attaching all moneys in the hands of the corporation of the town of Toronto Junction, garnishees, due, etc., to the defendant Ellis, judgment debtor. This order was served on the garnishees on the same day.

On the 14th January, 1893, the Judge of the County Court in Chambers made an order dismissing an application by the judgment creditors to make the attaching order absolute.

From this order the plaintiffs appealed to this Court. The facts are stated in the judgments.

The appeal was argued before HAGARTY, C. J. O., and BURTON, OSLER, and MACLENNAN, JJ.A., on the 22nd March, 1893.

W. R. Riddell, for the appellants.

Raney, for the defendant Ellis, respondent.

Going, for the garnishees, respondents.

April 20th, 1893. OSLER, J. A. :—

Judgment.

OSLER,
J. A.

This is an appeal by the judgment creditors, the bank, from an order discharging an attaching order and summons to pay over. The bank obtained judgment against the defendants, Ellis and Glen, in March, 1888, and on the 30th November, 1892, procured an attaching order against the garnishees, the town of Toronto Junction, to attach "all debts owing or accruing due from the garnishees, and all claims and demands of the judgment debtor P. Ellis against the garnishees, arising out of trust or contract, where such claims or demands could be made available under equitable execution." And the garnishees were ordered to appear on a day named to shew cause to the judgment creditors' application for an order directing them to pay "the debt due from them to the judgment debtor, or so much thereof as might be sufficient to satisfy the judgment."

On shewing cause it appeared that the "debt" sought to be garnished was the salary of the defendant as police magistrate of the town, and that at the time of service of the garnishee order nothing was actually due or accruing due therefor. The salary was \$800 per annum, and by arrangement with the town it was paid to the judgment debtor monthly in advance, and it had been so paid for the months of November and December, 1892.

What the judgment creditors relied upon was the language of the Con. Rule 935, which, by some means not brought to the notice of the Judges when the Rules were laid before them in 1887, has had inserted therein, after the words "order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor," the following new and sweeping clause: "and all claims and demands of the judgment debtor against the garnishee arising out of trust or contract, where such claims and demands could be made available under equitable execution." So that what is contended is that not only debts legal and equitable may be attached, as under the cor-

Judgment.

OSLER,
J.A.

responding English Rule, but also all claims and demands which may be thought to come within the terms of the new clause, where they could be made available under equitable execution, at the suit, it may be assumed, of the creditor. And the judgment creditors insist that the salary which may hereafter become due to the police magistrate is such a claim, and that they would be entitled to have a receiver appointed to collect it from time to time, and are therefore entitled to reach it by means of an attaching order.

There are many reasons why this order cannot be supported. I shall not attempt to exhaust them, but some of the most prominent may be pointed out. It is, of course, needless to say that the claim sought to be attached is not, in its present stage, a debt legal or equitable due or accruing due; and therefore, to be attachable at all, it must appear *in limine* to be a claim or demand within the meaning of the added clause of the rule, that is to say, a claim or demand arising out of trust or contract; and this, I think, is shewn not to be the case.

Police magistrates are appointed under R. S. O. ch. 72. Section 1 enacts that every police magistrate shall be appointed by the Lieutenant-Governor, and shall hold office during pleasure.

Section 2 enacts that every town having more than 5,000 inhabitants shall have a police magistrate, whose salary shall not be less than on the following scale: in towns where the population is not more than 6,000, \$800 per annum, etc.; and the salaries shall be paid half-yearly by the town.

I do not see that the fact of the town council having arranged with the magistrate to pay him his salary monthly in advance, instead of half-yearly, makes any legal difference in the position of the parties. It is an arrangement of convenience entirely, which either party might recede from at any time, and which could not be enforced by the police magistrate. The real obligation

which the town is under to pay the salary is statutory, and cannot be said in any sense to arise out of contract. Therefore there was nothing which could be reached under the terms of the new part of the rule, and as no part of the salary was actually due, or accruing due, there was no debt which could be attached.

Judgment.

OSLER,
J.A.

But, assuming that the execution creditor had surmounted this initial difficulty, I think the recent case of *Holmes v. Millage*, reported at present in 9 Times L. R. 331,* clearly shews that this "claim or demand" of the judgment debtor is not one of which the Court would grant equitable execution by means of a receiver. The salary had not been earned; it was to be earned by the future service of the judgment debtor. In the case cited the defendant was the Paris correspondent of an English newspaper, at a salary of £8. 8s. per week, payable weekly, when the defendant had acted as correspondent during the week, and he was liable to be dismissed at a week's notice. An order had been made appointing a receiver of all sums due and payable, or to become due and payable, to the defendant as salary for acting as foreign correspondent of the newspaper. This order the Court of Appeal discharged, and the judgment of Lindley, L. J., contains a valuable exposition of the principles on which the Court acts in granting a receiver to aid an ordinary judgment creditor to enforce his judgment against property not capable of being reached by any common law process. As applicable to the case in hand, I may quote the following passage: "The only case of this kind in which the Courts of equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law if he had had the legal interest in it instead of an equitable interest only. * * The principle on which alone the order in this case could be supported before the Judicature Acts is well explained by Lord Justice Cotton in *Anglo-Italian*

* Now reported [1893] 1 Q. B. 551.

Judgment.

OSLER,
J.A.

Bank v. Davies, 9 Ch. D. 290 ; it is that Courts of equity gave relief where a legal right existed, and there were legal difficulties which prevented the enforcement of that right at law. But the existence of a legal right is essential to the exercise of this jurisdiction. The judgment creditor here has a legal right to be paid his debt, but not out of the future earnings of his debtor ; and the Court of Chancery had no jurisdiction to prevent him from earning his living or from receiving his earnings, unless he had himself assigned or charged them. The Court could not restrain him from receiving them until his creditor could attach them under process of garnishment, nor did the Court ever presume to enlarge a judgment creditor's rights, nor, under colour of assisting him to enforce those rights, did the Court attempt to reach by its process a kind of property which was not liable to execution. Before debts and money were made liable to execution by statute, they could not be reached by an ordinary judgment creditor in equity any more than at law. If the earnings could have been reached under a writ of sequestration, a receiver might have been appointed, as in *Willcock v. Terrell*, 3 Ex. D. 323; but a writ of sequestration was never issued before the Judicature Acts in order to attach a man's personal earnings." Then the Lord Justice goes on to shew that the jurisdiction of the Court in this particular has not been enlarged by the Judicature Acts: " Unless a man has assigned or charged his future earnings or has made a sum payable out of them, they cannot be prospectively impounded by any of his creditors by any ordinary process of execution, whether legal or equitable. * * The law ought not to be altered by stretching what are called equitable executions, or, in other words, by appointing receivers in cases to which the equitable jurisdiction of the Court of Chancery had no application."

I am further of opinion that the salary of this judgment debtor, were it otherwise the subject of attachment, cannot be attached, nor is liable to be reached by way of equitable execution, on the ground that it is his official

salary payable to him as police magistrate, an office which is a public judicial office.

Judgment.

OFFER,
J.A.

Mr. Riddell urged that there was a difference between this case and others in which it has been so frequently laid down that such a salary is not assignable or garnishable, because of the fact that the salary is payable by the town, and not by the government; and he relied very much upon an expression of Cave, J., in *Re Mirams*, [1891] 1 Q. B. 594, where he says (p. 596): "To make the office a public office, the pay must come out of national and not out of local funds, and the office must be public in the strict sense of that term. It is not enough that the due discharge of the duties of the office should be for the public benefit in a secondary and remote sense." In that case the person the validity of an assignment of whose salary was in question, was a chaplain to a workhouse, who was appointed by the board of guardians, and whose salary was paid out of the local rates. He could, however, only be dismissed by the local government board, a department of government. It had never been held, as Cave, J., points out, that a clergyman having the cure of souls was a public officer.

Here the officer is a public officer in the strict sense of the term, and the public are interested, not only in the performance by him of his duties from time to time, but also in his being in a proper state of preparation to perform them. It is true that the salary is payable by the municipality and not by the Crown, but when the officer is appointed by the latter, and his duties are of a judicial character, I conceive that this circumstance, standing by itself, can make no difference. We must have regard to the legislation of the country, which has chosen in this manner to provide for the salary of the officer, whose appointment and removal, nevertheless, rest with the Crown. The observation of the learned Judge must be read with reference to the circumstances of the case, between which and those of this case there is no parallel.

I am, therefore, of opinion that the appeal should be dismissed.

Judgment. MACLENNAN, J. A.:—

MACLENNAN,
J.A.

I am clearly of opinion that the judgment appealed from is right.

The attaching order was made on the 30th of November last, and the summons to pay over was made returnable on the 3rd of December. On the return of the summons the town treasurer deposed that the debtor's salary as police magistrate for the month of November had been paid in advance on the first day of that month, and that when the garnishee order was served on the 30th, there was no sum whatever due to the debtor by the corporation. He also deposed that on the 2nd of December his salary for that month had been paid in advance, by a cheque dated and marked by the bank on the previous day. He also produced certain resolutions of the town council in relation to the debtor's salary, and, among others, one dated the 7th of November, 1892, authorizing the mayor and treasurer to pay the salary in advance.

The town treasurer was cross-examined upon his affidavit without eliciting any thing material.

The defendant was appointed by the Lieutenant-Governor in Council to the office of police magistrate of the town of Toronto Junction, under the Act, R. S. O. ch. 72, which declares that every town of more than 5,000 inhabitants shall have a police magistrate at a certain salary, which shall be paid half-yearly by the town, and he is to hold office during the pleasure of the Crown.

It was not contended that, as the law stood before the Consolidated Rule 935, the defendant's salary was attachable under such circumstances as are found in this case, but it was contended that the words in that rule, "and all claims and demands of the judgment debtor against the garnishee arising out of trust or contract, where such claims could be made available under equitable execution," so extended the power of attachment that it was applicable here.

It was contended that, inasmuch as the plaintiff might obtain a receiver by way of equitable execution in order to

reach the defendant's salary, that brought this case within the rule. But it is evident that such is not the meaning of the rule. The claims and demands referred to are the claims and demands of the debtor against the garnishee, and these may be attached where they could be made available under equitable execution. Available by and to whom? Evidently by and to the debtor, and not the execution creditor. The rule is describing and defining the nature of the debt from the garnishee to the debtor which may be attached; and it says that not only common debts, but claims arising out of trust or contract, which the debtor could not reach by ordinary action, but which he could reach by equitable execution, shall be attachable.

Judgment.

 MACLENNAN,
 J.A.

Now, there is no relation between the town and the debtor to call for the intervention of equity to make his salary available. If his salary is not paid half yearly as it is earned, he can sue for it as a statutory debt. But he has to earn it first. The town has chosen to pay it monthly in advance, and if they choose to do that, I do not see that the plaintiff can complain or interfere.

Mr. Riddell, in the course of his argument, cited many cases to shew that in this case the plaintiff would have been entitled to the appointment of a receiver in aid of his execution, to enable him to reach the defendant's salary, and to anticipate its payment. In the view I take of this case, it is not necessary to decide that point. And I may refer to *Re Potts*, 9 Times L. R. 308; and *Holmes v. Millage*, *ib.* 217; and to the same case in appeal, *ib.* 331. The last case in appeal contains a most instructive discussion of the whole subject of receivership in aid of an execution, by Lord Justice Lindley.

But I also think that the police magistrate is an officer connected with the administration of justice, whose salary is exempt from attachment, on the ground of public policy. He is appointed by the Crown during pleasure. His salary is fixed by the Legislature. It is attached to the office, and its payment is made obligatory on the municipality, and is not matter of contract between the latter and the officer.

Judgment. I think any interference with such a salary would be an interference with the office, and with the efficient discharge of the duties connected with it, which might be detrimental to the public service; and that the case therefore comes within the rule of protection. The duty of paying the salary is imposed upon the municipality by the Legislature in order to secure the efficient performance of important public duties connected with the administration of justice. I think that cannot be interfered with.

MACLENNAN,
J.A.

The appeal should be dismissed.

HAGARTY, C. J. O., agreed in the result, but expressed no opinion on the question of public policy, not having considered it.

BURTON, J. A., concurred on both grounds.

Appeal dismissed with costs.

IN RE CAMPBELL AND THE VILLAGE OF LANARK.

Municipal Corporations—Bonus—By-law—Evasion of Act.

A municipal corporation cannot now grant a bonus for promoting any manufacture, and what it cannot do directly it will not be allowed to do indirectly or by subterfuge.

Therefore a by-law, valid on its face, purporting to purchase a water privilege for electric lighting purposes, but shewn to be really a by-law to aid the owner of the water privilege in rebuilding a mill, was quashed. *Scott v. Corporation of Tilsenbury*, 13 A. R. 233, applied. Judgment of GALT, C. J., reversed.

Statement. THIS was an appeal from the judgment of Sir THOMAS GALT, C. J., dismissing an application to quash a by-law of the village of Lanark.

The by-law in question purported to be a "By-law to raise the sum of \$4,000 for the purpose of purchasing (from one Caldwell) for twenty years a water power for electric light purposes, and to authorize the issue of debentures therefor." After the formal provisions for the issue of

debentures, raising of rates, etc., there was the following Statement. clause :

"The said debentures shall be delivered to the said Kate S. Caldwell, when and so soon as she shall have erected on the mill site owned by her in the said village of Lanark a two-storey stone building, and placed therein roller machinery sufficient for the manufacture of sixty barrels of flour per day, and shall have executed an agreement with the said municipal corporation, granting to the said corporation the right to use for twenty years the water power or privilege owned by the said Kate S. Caldwell, but subject to the prior use thereof for the purpose of the said mill, and also granting for the said period of twenty years space in the said mill for the placing and operation of such machinery as the said municipal corporation may desire to place therein for the purposes of electric lighting."

The by-law was provisionally passed by the council of the village and then it was submitted to the ratepayers on the 4th of July, 1892, and was carried by a majority of fifteen votes, the total number of votes for the by-law being fifty, and against it thirty-five, and it was finally passed by the council on the 13th of July, 1892. It was contended by the applicant that instead of being a by-law for the purpose of purchasing water power for electric light purposes, it was in reality an indirect mode of giving to Caldwell a bonus of \$4,000 to aid her in rebuilding a grist mill that had been burnt down. The village contained a population of about 700 or 800 people, with a municipal council of five members; the relator being one, and he and one Trainor voted against the by-law, the other three members voting for it. It was clearly proved that it was at first proposed to give a bonus of \$4,000 to rebuild the mill, and that at a public meeting called to consider the matter it was pointed out that under the amended Consolidated Municipal Act the granting of a bonus was illegal, it being at the same time stated that there were ways of "getting round it." The reeve and others then spoke of the electric light project as a lawful way of effecting the desired object.

Statement.

The application was made on the 14th of October, 1892, before Sir THOMAS GALT, C. J., who on the 20th of October, 1892, dismissed it, holding that the by-law was valid under 55 Vic. ch. 42, sec. 479 (O.), which expressly empowers any municipal corporation to purchase any water power for the purpose of "obtaining power to run or drive the necessary machinery for the supplying of electric light within the municipality."

The applicant appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 24th of March, 1893.

Osler, Q. C., for the appellant. It is not disputed that there is power to pass a by-law for the purchase of water power for electric light purposes, but it is clear that in the present case this is not the real purpose of the by-law, but it is an attempt to give in a round about way a bonus for the rebuilding of the mill in spite of the prohibition contained in the Consolidated Municipal Act of 1892. The by-law, therefore, being an evasion or an attempted evasion of the law, should be quashed: *Scott v. Corporation of Tilsonburg*, 13 A. R. 233.

Marsh, Q. C., for the respondents. The by-law is good upon its face, and there is no admissible evidence to show that its purport is not that which it appears to be. The scope and object of a corporate act of this kind must be ascertained from the act itself, and not from the views of any individual corporators. The by-law has been properly published and submitted to the ratepayers, and it is not shewn that any ratepayer has voted for the by-law from any improper motive, or that any ratepayer has been in any way misled as to its scope and object. The opinions expressed by individual members of the council, or by individual ratepayers, and the motives and designs which actuated them in passing the by-law cannot be enquired into by the Court: *Soon Hing v. Crowley*, 113 U. S. 703.

Osler, Q. C., in reply.

April 20th, 1893. HAGARTY, C. J. O. :—

Judgment.

HAGARTY,
C.J.O.

I need not enter into any detailed analysis of the evidence.

Mr. McLean, the reeve, whose name is frequently mentioned in the affidavits, as taking the most active part to carry out this project, and in giving it its present aspect to get round the objections to the bonus grant, was examined as to statements made by him. His affidavit in answer does not meet the grave charges as to the evasion of the statute by giving the by-law an apparently legal bearing. When placed under cross-examination he refused to answer, under advice of counsel, as to the public meetings or any question not bearing on any evidence given in his affidavit. This was a very safe course, as the affidavit carefully avoided any reference to the real charge against the by-law as a mere evasion of the statute.

Mr. Field, the clerk of the council, adopts the same tactics. His affidavit carefully avoids the real point in issue. He declines to answer all questions not bearing on his affidavit as to public meetings, and even as to the last question.

Q. "Whether the whole matter voted on by the citizens was one of the rebuilding of the Caldwell grist mill." A. "I decline to answer."

In a Court of Justice parties would not be permitted to act in this manner.

On the whole case it appears to me clear beyond controversy, that the by-law in its present shape is a plain evasion of the very wholesome provision of the statute forbidding the granting of a bonus.

There is, beside the direct charges, an air of unreality about the whole electric light matter. We can hardly imagine a village of 700 inhabitants voting \$4,000 merely for water power, with no estimate before the voters of the probable expense of the plant or machinery or cost of working or maintenance.

The object of getting the mill rebuilt and its resumption

Judgment. of work, was intelligible enough. The attempt to effect
HAGARTY, the same object by this device adopted, is equally clear,
C.J.O. but cannot be successful.

The jurisdiction of the Courts of Justice to set aside a by-law passed as this was, although apparently valid on its face, has been exercised with wholesome effect on several occasions.

We had to consider it in the case of *Scott v. Corporation of Tilsonburgh*, 13 A. R. 233. It was there said: "It may be conceded that it is not a matter for judicial review, whether they (the corporation) wisely or unwisely exercise the power, provided such exercise be directly resorted to for the simple statutory purpose of exempting a manufactory from assessment: but I am wholly unable to read the statute as authorizing the exemption for the express purpose of an evasion of another statutable authority."

The emphatic words of Sir J. B. Robinson (*Re Barclay and Darlington*, 12 U. C. R. 86) in the early days of our municipal system, are quoted in the case, and need not be here repeated.

Re Morton and St. Thomas, 6 A. R. 323, and other cases cited in the *Tilsonburgh Case*, may be referred to.

I think the evidence is overwhelmingly clear that the case before us comes fully within the mischief which the Courts are bound to guard against, and that we must allow the appeal, and that the by-law must be quashed with costs, and the costs of appeal allowed to appellant.

OSLER, J. A. :—

I am compelled, with all deference to the learned Chief Justice of the Common Pleas Division, to concur in reversing this judgment, and to hold that the by-law should be set aside on the ground that it is undeniably established by the evidence of the members of the council by whose votes the by-law was passed, and by that of their clerk or officer, that the object of the by-law was not that which

on its face it purports to be, but that under cover of an apparently lawful purpose the council were intentionally and deliberately doing what they knew they had no authority to do, namely, granting a bonus to Mrs. Caldwell.

I do not think that the fact of its having been voted upon by the electors makes any difference. That course was taken only because the council had not the money at their command out of the rates of the current fiscal year; and they were not bound to pass it merely because it had been carried by the popular vote.

We can see very plainly from the evidence that it was carried on the footing of its being a bonus by-law, though it professed to be one for the purchase of a twenty years' water power or privilege to provide for electric lighting; and it was for the forbidden purpose that the council passed it after it was so carried at the poll. The case seems entirely within the principle of the authorities which this Court followed in the recent case of *Scott v. Corporation of Tilsonburgh*, 13 A. R. 233, in which the difference between our law and that administered in the American Courts, in the matter of setting aside by-laws of municipal bodies, was pointed out, a difference arising from the legislation which confers upon our Courts a power which courts in the United States have not, and which makes much of the reasoning in such cases as *Soon Hing v. Crowley*, 113 U. S. 703, inapplicable.

I venture to think that the facts of the present case shew the necessity for the existence of a tribunal with the power of keeping municipal corporations in check.

MACLENNAN, J. A. :—

I also am respectfully of opinion that this appeal should be allowed.

I think it is to be regretted that the reeve and clerk of the council should have been advised by the solicitor for the corporation to refuse to answer questions on cross-

Judgment.

OSLER,
J. A.

Judgment. examination upon their affidavits upon matters outside of
MACLENNAN, what they had spoken of in their affidavits. I cannot
J.A. doubt that if they had not refused to answer, they would
have told the same story in its main features as was
candidly told by Mr. Wilson.

But putting aside this regrettable feature of the case, I have been led by a perusal of the evidence to the irresistible conclusion that this by-law was passed for a different purpose from that which is expressed on the face of it, namely, to aid Caldwell to rebuild the mill, and not to provide electric lighting for the village.

That being the case, I think the case of *Scott v. Corporation of Tilsonburgh*, 13 A. R. 233, is an authority binding upon us, affirming our power as well as our duty to set this by-law aside.

BURTON, J. A. :—

I agree.

Appeal allowed with costs.

IN RE THOMPSON V. HAY.

Prohibition—Division Court—Territorial Jurisdiction—Transfer—R. S. O. ch. 51, sec. 87—52 Vic. ch. 12, sec. 5 (O.)

Under R. S. O. ch. 51, sec. 87, as amended by 52 Vic. ch. 12, sec. 5 (O.), either party in a Division Court action may, after notice disputing the jurisdiction has been duly given, apply to have the action transferred to another Court. If no application be made, and if in fact there be jurisdiction, prohibition will not lie merely because the Judge has assumed that as no application for a transfer had been made he had jurisdiction, i.e., has not tried the question of jurisdiction. But if, in fact, there be no jurisdiction the objection still holds good, and prohibition will be granted.

Judgment of the Queen's Bench Division, 22 O. R. 583, affirmed.

THIS was an appeal from the judgment of the Queen's Bench Division, reported 22 O. R. 583. Statement.

The plaintiff, who resided in the city of London in the division of the first Division Court of the county of Middlesex, brought an action in that court against the defendant, who lived at Woodstock, in the county of Oxford, to recover the sum of \$59.40, the price of a waggon manufactured by the plaintiff in London, and shipped by him to the defendant at Woodstock. The defendant within the proper time filed a notice disputing the jurisdiction of the Court. No application was made by either party to transfer the action to any other court, and it came on for trial at London in due course, when a solicitor appeared on behalf of the defendant, and contended, pursuant to the notice, that there was no jurisdiction to hear the case. The solicitor for the plaintiff contended that an application should have been made by the defendant to transfer the case to the proper court, and the Judge upheld that contention and refused to hear witnesses on behalf of the defendant who were present for the purpose of giving evidence on the question of jurisdiction. The defendant had no witnesses present for the defence of the action, and the Judge gave judgment for the plaintiff on his own evidence, after, as was alleged, some cross-examination by the defendant's solicitor.

The defendant made an application before ROSE, J., for

Statement. prohibition on the 16th of January, 1892, affidavits being put in by both parties, setting out the facts as to the making of the contract. That application was refused, but on appeal to the Divisional Court the order was reversed and prohibition was granted.

The plaintiff then appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 23rd and 24th of March, 1893.

Shepley, Q. C., for the appellant. The contract in this case was made in London, and the action was therefore brought in the proper court: *Cowan v. O'Connor*, 20 Q. B. D. 640; *Re Noble v. Cline*, 18 O. R. 33. At all events the question of the place of the making of the contract was tried and determined on sufficient evidence, and even if this decision is erroneous the Court cannot interfere by prohibition: *Mayor of London v. Cox*, L. R. 2 H. L. 239. Merely filing a notice disputing the jurisdiction of the Court was not sufficient. The defendant, if he intended to rely on that objection, was bound under section 87 of the Division Courts Act, R. S. O. ch. 51, as amended by 52 Vic. ch. 12, sec. 5 (O.), to apply to have the action transferred to the proper Court. It is clear that the intention of this amending Act was to provide an inexpensive method whereby disputes as to jurisdiction might be determined, and even if, as the defendant contends, he was sued in the wrong Court, he was not entitled to apply for prohibition without having made an application for transfer. It has been contended by the defendant that he did make that application at the trial, and that a hearing of that application was refused, and a majority of the Judges in the Court below have so held; but it is submitted that the application contemplated by the Act is not an application at the trial but a preliminary application. There was in fact no application even at the trial. The objection to jurisdiction was taken, but no transfer to another Court was asked, and there was no

affidavit as required by the Act to satisfy the Judge of the alleged want of jurisdiction. If, however, what took place can be held to be an application for transfer, then if the Judge came to a wrong decision on that application, that is the end of the matter and prohibition cannot now be obtained. Argument.

G. W. Marsh, for the respondent. It is clear that the Division Court Judge refused to even consider much less decide the question of jurisdiction. The right of a defendant to apply for prohibition, on account of want of jurisdiction, is not taken away by 52 Vic. ch. 12, sec. 5 (O.). The true construction of that section is that on a notice disputing jurisdiction being given by the defendant, the party initiating the proceedings is entitled to apply to the Court to transfer the action. The original of section 87 was section 11 of 43 Vic. ch. 8 (O.), which was clearly passed for the benefit of plaintiffs. The amendment is a still further benefit to plaintiffs, and it would be inequitable to construe it so as to cast upon defendants the burden of making such an application as this. From the evidence it is clear that the contract in question was made or partly made in Woodstock, and that the breach thereof took place in the county of Oxford, so that the Division Court at London had no jurisdiction to try the action.

Shepley, Q. C., in reply.

April 20th, 1893. BURTON, J. A.:—

The reasons given by the learned Judges in the Divisional Court do not seem to warrant the conclusion at which they arrived in favour of granting the writ of prohibition, as the refusal of the County Judge to consider the question of jurisdiction would seem rather to be a ground for moving for a mandamus, and would not in itself be a sufficient ground for prohibition by the High Court, unless it is first established to the satisfaction of that Court that the cause of action was beyond the jurisdiction of the inferior Court; see *White v. Steele*, 12 C. B. N. S.

Judgment.

BURTON,
J.A.

383. Whenever that want of jurisdiction is established in the higher Court, but not till then, it is not a matter of discretion, but the Court is bound to interfere even though there may be a possibility of correcting it by appeal unless in cases where the defect is not apparent and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, but thought proper, without excuse, to allow that Court to proceed to judgment without setting up the objection; see *Broad v. Perkins*, 4 Times L. R. 775.

That was not the case here. The defendant had taken the objection to the jurisdiction and was entitled to have it tried. If the objection to the jurisdiction was well founded he is entitled to the writ.

As the law now stands, a defendant would be held to have waived or to have lost his right to object to the jurisdiction, if he omitted to give the notice required by section 87 of the Division Courts Act.

But if he has given that notice the plaintiff can in an inexpensive way transfer the pending proceedings to the proper division, but he may dispute the alleged want of jurisdiction, and it then becomes the duty of the Judge in whose division the proceedings were taken, when the case comes on for trial, first to decide the preliminary question of jurisdiction. This the learned Judge declined to do, holding that the defendant's only remedy was by motion to transfer. In this the Court below has held, and I think properly held, that he was mistaken.

This, however, would be no ground for a prohibition unless the Court is satisfied that there really was an absence of jurisdiction.

No reference to this point appears in the reasons given by the learned Judges below, probably because they thought it patent upon the evidence and depositions that the cause of action did not wholly arise in the city of London, in which I should quite agree, and it is because I am so satisfied that I have come to the conclusion that the writ of prohibition was properly granted.

Mr. Justice Falconbridge, who gave a dissenting judgment in the Divisional Court, did so on the assumption that the defendant had disentitled himself to the relief sought by reason of his not asking a postponement, and having taken his chances of a decision in his favour. I do not so read the evidence of what occurred at the trial. He did not require a postponement; he had a witness there for the purpose of shewing the want of jurisdiction. The learned Judge peremptorily refused to go into that question, and that witness consequently was not examined.

It is said that when the learned Judge proceeded to dispose of the case upon the merits the defendant's agent cross-examined the plaintiff. It is very faintly shewn, and the nature of that examination is not disclosed, and it is denied in the reasons against appeal. He had done all that was necessary to raise the question of jurisdiction, but it would require very clear evidence of abandonment where the jurisdiction depends on an Act of Parliament. The questions may have been put for the purpose of still convincing the Judge that he had no jurisdiction. I do not think it is any answer to the application; see *Knowles v. Holden*, 24 L. J. Exch. 223.

I am of opinion, therefore, that the judgment of the Queen's Bench Division is correct, and that the appeal should be dismissed.

OSLER, J. A. :—

The motion made by the defendant in this matter was to prohibit the first Division Court of Middlesex from enforcing the judgment given for the plaintiff on the ground that the cause of action in the suit did not wholly arise, and that the defendant did not reside or carry on business, within the limits of the said first Division Court.

By the 176th section of the Division Courts Act, a defendant who intends to contest the jurisdiction of a Division Court to hear or determine any cause in such Court, is required to leave with the clerk a notice to the effect that

Judgment.

BURTON,
J.A.

Judgment.

**OSLER,
J.A.**

he disputes the jurisdiction, and in default of such notice the jurisdiction shall be considered as established and determined; and all proceedings may thereafter be taken as effectually as if the cause had been properly commenced in such Court; and prohibition shall not lie where notice disputing the jurisdiction has not been so given. By section 87 of the Act as amended by 52 Vic. ch. 12, sec. 5 (O.), it is enacted that if an action be entered in the wrong Division Court, which might properly have been entered in some other Division Court, the same shall not abate as for want of jurisdiction, but all the papers, etc., in the cause may be transferred by the Judge to any Division Court having jurisdiction; and the action may there be carried on to the conclusion as if it had been originally entered there. The amendment provides that "the party making the application shall satisfy the Judge by affidavit of the alleged want of jurisdiction of the said Court."

The defendant gave the notice required by section 176, but neither party made any application to the Judge to transfer the suit under section 87 to any other Division Court.

That section is very loosely worded; it is not said who is to apply for the order of transfer, or at what stage of the proceedings it may be made. It might be supposed that the plaintiff was at liberty to submit to the defendant's objection and to obtain the order as a matter of course but that the amending Act requires the party making the application to satisfy the Judge by affidavit of the alleged want of jurisdiction. This seems to point to the defendant as the proper party to move. On the other hand, before the amending Act, it clearly rested upon the plaintiff to do so, and he must have been able to shew that the case had been entered in the wrong Division Court "by mistake or inadvertence," which is no longer necessary. On the whole it seems to me that either party may now move to transfer; and I agree with what is said to have been held in the Courts below, that a motion for prohibition ought not to be entertained until the Division

Court Judge has had an opportunity of ordering the transfer of the cause to the proper Court. But suppose neither party moves to transfer before the trial, what is the consequence? The Act does not give the particular Court jurisdiction, failing the motion, where the jurisdiction does not exist. The case shall not abate as for want of jurisdiction, but still the Judge cannot try it if there is none. He can only order it to be transferred. The question of transfer is then postponed to the trial, where no doubt, if the want of jurisdiction appears, the plaintiff will have no difficulty in making the necessary affidavit and application which the Judge can grant on proper terms.

Judgment.

OSLER,
J.A.

If the question is disposed of at the trial adversely to the defendant, then, as the Judge may be right, he must be prepared to proceed with the trial on the merits, having still as a rule the right to move for prohibition if it can be shewn that he was wrong, for I do not think the section intended that the Judge's decision on this point was to be final.

Whether the Judge refuses to entertain the question of jurisdiction, or whether he decides it wrongly, seems to me strictly immaterial as regards the defendant's position, for having got to the trial the right to proceed with it depends upon whether there was, in truth, jurisdiction; and prohibition cannot in my opinion be granted merely because the Judge assumed that he had jurisdiction, because no previous motion had been made to transfer the case. He has refused to transfer the case and has tried it on the merits, which he had the right to do provided he had jurisdiction; and the only question after that must be just what the defendant has raised on the motion, viz., "Whether there was in truth jurisdiction," because prohibition must ultimately go if the Judge persists in trying a case where he has none.

It seems something like an absurdity to say that prohibition is to go because the Judge did not at the trial try whether he had jurisdiction, and yet jurisdiction may all the time in fact exist.

.

Judgment.

OSLER,
J.A.

Then upon the merits : it appears to me that there was no jurisdiction. The action is really one for breach of contract, not for work and labour, or goods sold and delivered. The contract was one of barter or exchange—the plaintiff's donkey cart for the defendant's waggon, the former to be shipped at London to the defendant at Woodstock, which was done ; the latter to be shipped at Woodstock to the plaintiff at London, which was not done. The breach of contract therefore occurred at Woodstock, and so the "cause of action," which has been determined again and again to mean under the Division Courts Act, the whole cause of action, did not arise in London, but partly in London and partly in Woodstock. The first Division Court of Middlesex therefore had no jurisdiction, and the judgment of the Court below must on that ground be affirmed.

MACLENNAN, J. A. :—

It is evident that the objection here taken to the jurisdiction is one that depended on evidence. The plaintiff could not prove his case without also proving the facts on which the jurisdiction depended. The plaintiff has to prove a cause of action, that is, a contract and breach of it, in London.

I agree with the Divisional Court that the learned Judge was wrong in holding that the defendant was bound to apply before trial under section 87, and that not having done so he was precluded from raising the objection at the trial. He should have heard the evidence the defendant had to offer on the question of jurisdiction, and having refused could be compelled to do so by mandamus. If the defendant had withdrawn when the Judge refused to hear him, and had applied for a mandamus, I do not see what answer could be made to such an application. It would have been no answer to say that he might have shewn the want of jurisdiction in the course of the trial. That is true, but the learned Judge had already decided

the point against him. I think the judgment which was rendered on the merits afterwards could not stand in the way of a mandamus, but that the Court would go behind it to correct the previous error.

The defendant, however, has not taken that course. He has not chosen to seek to compel the learned Judge to try the question of jurisdiction. He cross-examined the plaintiff at the trial, and then he took a course which was quite open to him, he applied for a prohibition, undertaking to make out to the satisfaction of a Judge of the High Court that the cause of action did not arise in London. That was the question before my brother Rose which he decided adversely to the defendant.

The Divisional Court has given no opinion upon that point, although it seems involved in their decisions which reversed the judgment of Mr. Justice Rose.

The question is one of some nicety. To uphold the jurisdiction, both the contract and the breach must have been in London.

[The learned Judge then discussed the facts as to the transaction, coming to the conclusion that there was not a complete cause of action in London.]

The judgment, therefore, is void, but there is nothing to prevent the learned Judge from transferring the action to the proper Court in pursuance of section 83 of the Division Court Act.

The appeal should therefore be dismissed. The judgment in the Division Court should be declared to be void, but the prohibition should not be held to prevent the Judge of the County Court from transferring the action to another Division under section 83 of the Act.

HAGARTY, C. J. O. :—

I agree with the judgments of the majority in the Court below.

Appeal dismissed with costs.

Judgment
MAULENNAN,
J.A.

THE WATER COMMISSIONERS OF THE CITY OF WINDSOR V.
THE CANADA SOUTHERN RAILWAY COMPANY.

Municipal Corporations—Assessment and Taxes—Exemptions—Extension of Town—R. S. O. ch. 184, secs. 22, 54—Windsor Water Works—37 Vic. ch. 79, secs. 11, 12 (O.).

The defendants were the owners of vacant land in the city of Windsor, abutting on streets in which mains and hydrants of the plaintiffs had been placed. The defendants had a water works system of their own and did not use that of the plaintiffs, though they could have done so had they wished. The Commissioners imposed a water rate "for water supplied, or ready to be supplied" upon all lands in the city based upon their assessed value irrespective of the user or non-user of water:—*Held*, that this rate was, under 37 Vic. ch. 79, secs. 11, 12, validly imposed.

The lands owned by the defendants were originally part of the township of Sandwich West, and by a by-law of that township, confirmed by special legislation, were exempted from taxation for ten years from the 1st of January, 1883. In 1888 the limits of the (then) town of Windsor were under the provisions of R. S. O. ch. 184, sec. 22, extended so as to embrace the lands in question:—

Held, that assuming that the water rate was a species of taxation, the effect of R. S. O. ch. 184, sec. 54, was to put an end to the exemption. *Municipality of Cornwallis v. Canadian Pacific R. W. Co.*, 19 S. C. R. 702, distinguished.

Judgment of the County Court of Essex affirmed.

Statement.

THIS was an appeal by the defendants from the judgment of the County Court of Essex.

The action was brought to recover the sum of \$200, water-rates for the years 1890 and 1891, imposed upon the defendants under the authority of 37 Vic. ch. 79 (O.), "An Act respecting Water-rates in the town of Windsor," the rate being imposed "for water supplied or ready to be supplied." The rate was based on the city assessments, and was not dependent on user.

The defendants disputed their liability on the ground that the rates were not legally imposed; and also on the ground that by a by-law of the township of Sandwich West, passed on the 24th of August, 1882, they and their property within what is now known as ward No. 6, in the city of Windsor, were exempted from municipal assessment or taxation for a period of ten years from the 1st of January, 1883. By proclamation of the Lieutenant-Governor in council, dated the 5th of October, 1888, under the

authority of the Municipal Act, R. S. O. ch. 184, sec. 22, the territory in question was detached from the municipality of Sandwich West, and added to the town of Windsor. The property in respect of which the rates were imposed was vacant land, and no water was used by the defendants, who had a waterworks system of their own. Water mains with hydrants were laid in the streets adjoining the lands. Statement.

The action was tried at Sandwich, on the 4th of October, 1892, before Horne, County Judge, and on the 5th of November, 1892, judgment was given in favour of the plaintiffs for \$200 and full costs of suit.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 22nd of March, 1893.

D. W. Saunders, for the appellants. The authority of the respondents to impose rates for water is contained in sections 11 and 12 of the Windsor Water Works Act, 37 Vic. ch. 79 (O.), and the provisions of these sections have not been complied with, but the rates have been imposed without any regard to the circumstance that the water has not been used. It is clearly the intention of the sections that a price should be specified in cases where the water is used, and a rate fixed where water is not used. The true purpose of the Act is that the commissioners should provide a revenue from water consumers, and should only resort to a rate on nonconsumers in event of the revenue not being sufficient to provide for the maintenance of the works; that is, the Act does not provide for the levying of a tax on nonconsumers for the benefit of consumers, so as to reduce the price. But if the commissioners have power in ordinary cases to impose the rate upon nonconsumers, they cannot impose such a rate upon the present appellants, for by a by-law of the township of Sandwich West the appellants are exempted from all taxation. This water-rate is clearly a tax: *Lex Exoneratissima de H.*

Argument. *Sulpice v. Montreal*, 16 S. C. R. 399; *Attorney-General of Canada v. City of Toronto*, 18 A. R. 622. The latter case was reversed in the Supreme Court, but the decision as far as applicable to the present question is not affected. The town of Windsor taking in the exempted land must take it in subject to the exemption: *Municipality of Cornwallis v. Canadian Pacific R. W. Co.*, 19 S. C. R. 702.

A. M. Grier, and *R. McKay*, for the respondents. The user or nonuser of the water is not to be considered. The commissioners are to take the city assessments as a basis for a general rate, and then to add further charges if any special benefit is conferred. The exemption by-law would apply only to taxes at that time in force, and the township of Sandwich West could not exempt property from taxes to be thereafter imposed by another power. But these rates are not taxes at all. It must be conceded that if the water were used the rates imposed would not be taxes but would merely be payment for the commodity supplied. This distinction is pointed out in the case of *Attorney-General of Canada v. City of Toronto*, 18 A. R. 622, relied on by the appellants. If user or nonuser were to determine the question, the rate might be a tax at one time and not a tax at another. The question is one of supply and demand, and must be determined according to the circumstances existing at the time of the imposition of the rate.

D. W. Saunders, in reply.

April 20th, 1893. OSLER, J. A.:—

I will first consider what rights, if any, the defendants enjoy under the exemption by-law of Sandwich West, of August 24th, 1882.

The by-law recites that the defendants propose to extend their line of railway from the main line to a point within the limits of the township, and to make the same their chief terminus, on condition that their property within the limits of the township shall be exempt from

municipal assessment or taxation for ten years. It is then enacted in exercise of the powers assumed to be conferred upon the municipality by the Canada Southern Railway Act, 33 Vic. ch. 32 (O.), that the company and the real and personal property as hereinafter described, "which shall be situate and within the limits of the said township of Sandwich West, shall be and are thereby exempt from taxation for ten years from January 1st, 1883."

Judgment.

OSLER,
J.A.

No personal property is described in the by-law, and it states that it is passed upon the condition that the company commence the construction of their extended line of railway within six months from its date, and permanently locate and erect within the township, within that time, suitable passenger and freight stations, and continue to use the same during the said period of ten years.

Doubts appear to have arisen as to the power of municipalities to pass such by-laws, and in the year 1884, by 47 Vic. ch. 64 (O.), this by-law, and a similar by-law of the township of Stamford, were expressly "legalized, confirmed, and declared to be valid, notwithstanding anything in any Act to the contrary, provided that school and county rates shall be exempted from the operation of the said by-law."

It was further enacted that the provisions of the by-law should have the same effect as if they were incorporated in the Act, and should be subject to the Act.

The lands and premises described in the by-law are comprised within that portion of the territory of the township which was severed from the township and annexed to the town of Windsor by the proclamation of the 5th October, 1888, and the rates in question were imposed on these lands by the town of Windsor (1) from 1st April, 1890, to 1st January, 1891, amounting to \$112.16; (2) from 1st January, 1891, to 1st January, 1892, amounting to \$116.60, the waterworks having been extended into the new territory, or 6th ward, in 1889 and 1890.

In support of his contention that the company's property remained exempt by force of the by-law and the statute

Judgment

OSLER,
J. A.

confirming it, notwithstanding it had ceased to be a part of the township of Sandwich West, Mr. Saunders relied upon the case of *Municipality of Cornwallis v. Canadian Pacific R. W. Co.*, 19 S. C. R. 702. There it appeared by the company's charter and their contract with the Government that the lands to which they were entitled in the North-West Territory were, until they were either sold or occupied, to be exempt from taxation for twenty years after the grant thereof from the Crown. Certain of these lands afterwards ceased to answer the description of lands in the North-West Territory, an Act of Parliament having been passed extending the limits of the Province of Manitoba, whereby they came within and became part of the territory of that Province. It was held that they did not thereby lose their exemption from taxation, and the case would be very much in point, but for section 54 of the Municipal Act, not referred to by either party on the argument, which enacts that, "In case an addition is made to the limits of any municipal township, the by-laws of such municipality shall extend to the additional limits; and the by-laws of the municipal township from which the same has been detached, shall cease to apply to the addition, except only by-laws relating to roads and streets; and these shall remain in force until repealed by by-laws of the municipality to which the addition has been made."

The effect of this section, in my opinion, is that when the property exempted by the by-law in question, was severed from the township of Sandwich West, the by-law ceased to apply to it, and therefore there is nothing to which the defendants can appeal as exempting them from taxation in respect of it. It became part of the town of Windsor, and liable to taxation as other property in that municipality.

Indeed the by-law itself seems to be framed in view of section 54, and of just such a contingency as has happened, as if the township had expressly intended to exempt the property only while within its limits, enacting as it does, that the property therein described, "which shall

be situate and within the limits of the said township of Sandwich West," shall be exempt, etc.

Judgment.

OSLER,
J.A.

The defendants might, perhaps, have made terms with the town under section 22, before the proclamation was issued, but not having done so, I think they can claim no benefit from a by-law no longer in force in the territory taken from the township which passed it.

I am also of opinion that the validating Act of 1884 does not help the defendants; it only confirms the by-law as a by-law of Sandwich West, and exempts from liability to taxation property in that township, leaving section 54 to its natural operation.

The case of *In re Cunningham v. Almonte*, 21 C. P. 459, has no application to section 54. It arose under section 53, which provides for the case, not of a new addition to the limits of an existing municipality, but of the incorporation of a village, or the erection of a village or town into a town or city. In these cases the by-laws in force in the territory which forms the limits of the new corporation, remain in force until legally altered.

The defendants also argued that the rates for which they were sued had not been legally imposed under the provisions of the Waterworks Act and by-law.

Section 11 of the Act enacts that the commissioners shall regulate the distribution and use of the water in all places and for all purposes, where the same may be required; and from time to time shall fix the price for the same and the payment.

And section 12, that the commissioners shall have power and authority and it shall be their duty from time to time, to fix the price, rate, or rent payable by any owner or occupant of any house, tenement, lot, or part of a lot, or both, in, through, or past, which the water pipes shall run, whether such owner or occupant shall use the water or not, having due regard to the assessment and to any special benefit or advantage derived by such owner or occupant. or conferred upon his property by the waterworks and the locality in which the same is situate.

Judgment.

OSLER,
J.A.

Pursuant to these sections, a by-law was passed on 31st March, 1890, regulating the prices and rates to be paid for water supplied or ready to be supplied to the several descriptions of property enumerated, assessed on the last revised assessment roll, on a certain scale therein specified, in proportion or having regard to the assessed value. Vacant lots are one of the enumerated classes, and they are charged a rate of five-tenths of one per cent. of their valuation. The defendants' property, as I gather from the evidence, is in this class.

In addition to the rates so specified, there are extra and miscellaneous rates, payable for special businesses or special purposes.

The contention of the defendants is that the price for water used and the rate to be paid where it is not used, should be separately specified, and that what is done by the by-law merely is to fix prices or rates of general application as for water supplied, instead of distinguishing between user and nonuser.

The construction of these sections is not free from difficulty, but upon the best consideration I have been able to give to the question, I am of opinion that the mode which the plaintiffs have adopted of fixing the rate does not contravene the statute. I do not read the statute as enacting absolutely that the price (for that term is used in both sections) in case of user of the water shall be different from or higher than that which may be fixed in case of nonuser. This price or rate is to be paid by the owner or occupant of the house, tenement, or lot, etc., *in, through, or past* which the water pipes shall run. The owner or occupant may not choose to use the water, but it is there ready to be used by him if he does, and therefore I think the framers of the by-law have rightly construed the section, in fixing the general rate as "for water supplied or ready to be supplied."

In estimating what is a proper charge to be made for water actually supplied, I see nothing in the Act to prevent the commissioners from adopting the assessed value as a guide.

To take for example the lowest rate. A house assessed at \$600 or under is to pay \$7.60 per annum. If the owner does not choose to use the water, the pipes carrying which may be in, or may go through, or may run past, his house, how can it be said that the imposition of the same price or rate is illegal or unreasonable. His property is directly benefited if he chooses to use the benefit, and regard is had, as section 12 requires, to the assessment. So with regard to other buildings, and buildings bearing a higher assessed value and presumably, therefore, more capacious, and using, or capable of using, more water.

Judgment.

OSLER,
J.A.

Then in the case of vacant lots, which is the present case, where the user of water must be reduced to a minimum ; the special charge is made of five-tenths of one per cent., based also on the valuation.

The commissioners have practically divided property in the first instance into two classes, that which is built upon and that which is vacant. Owners of the former class naturally enjoy a special benefit and advantage which those of the latter, whose ability to use the water at all is very limited, do not, and in fixing a lower rate for that class and at the same time having regard in doing so to the assessment, I think the commissioners have done all that the statute requires.

Other objections to the rate are taken in the reasons of appeal, but they are not supported by the evidence.

Whether the rate so fixed, which is by the Act declared to be a lien or charge upon the property, can be regarded as a tax, is a question which must at present be left where this Court and the Supreme Court left it in *Attorney-General v. City of Toronto*, 18 A. R. 622, (not yet reported in the Supreme Court).

The appeal must therefore be dismissed.

MACLENNAN, J. A. :—

The plaintiffs were incorporated by an Act of the Legislature, 37 Vic. ch. 79 (O.), with power to manage the system of waterworks for the town and to carry out the water

Judgment.
MACLENNAN,
J. A.

powers conferred upon them thereby. By section 11 they were empowered to fix the prices for the use of water, and the times of payment; and by section 12 to fix the price, rate or rent, which any owner of land in, through, or past which the water pipes should run, should pay as water rate or rent, whether the owner should use the water or not, having due regard to the assessment and to any special benefit and advantage secured by the owner, or conferred upon his property by the waterworks, and the locality on which it was situate. It was also declared that the water-rate should be assessed by the commissioners on the owner, and should be and continue a lien or charge, unless paid, on the land, in the same way as other taxes on the said owner are liens. They also had power to fix the rate or rent to be paid for the use of the water by hydrants, fire plugs and public buildings.

It was contended that as the defendants did not use the water they could not be assessed, unless the revenue derived from the use of the water was shewn to be insufficient for the maintenance of the works. I do not think this objection or any of the other objections made to the assessment can be maintained. I think that section 12 distinctly authorizes the commissioners to assess the owners of property, in, through, or past which the water pipes run, whether they use the water or not, so long as they have due regard to the assessment and the other matters in the section. It is admitted that the mains run past the company's property, that the assessment is fair, and the cost imposed on the company is the same as is imposed upon all other property in the town, in proportion to assessment. Where the water is actually used parties are charged for that in addition to the rate based upon the assessment.

I therefore think that the assessment complained of is authorized by, and is in accordance with the statute, and that this objection to the judgment fails.

The other objection is also in my opinion equally untenable. The company's Act authorizes municipalities

through which the railway runs to exempt the company and its property from taxation by by-law to be passed for the purpose, 33 Vic. ch. 32, sec. 8 (O.).

Judgment.

MACLENNAN,
J.A.

In pursuance of this authority the township of Sandwich West, on the 24th of August, 1882, passed a by-law declaring that the company and its real and personal property within the limits of the township, should be exempt from taxation for ten years, from and after the first day of January, 1883. On the 11th of June, 1888, the corporation of Windsor passed a by-law under section 22 of the Municipal Act to extend the town limits so as to include a portion of Sandwich West, of which the railway lands now in question formed part. This resolution was acted upon by the Lieutenant-Governor in Council, on the 5th of October, 1888, who by proclamation made the required addition to the limits of the town. The proclamation is silent as to any terms or conditions as to taxation or otherwise.

Section 54 of the Municipal Act, R. S. O. ch. 184, provides that in case an addition is made to the limits of any municipality, the by-laws of such municipality shall extend to the additional limits ; and the by-laws of the municipality from which the same has been detached shall cease to apply to the addition except only by-laws relating to roads and streets, which shall remain in force until repealed by by-laws of the municipality to which the addition has been made. The only other section of the Act providing for what is to be done in such a case is section 56, which provides for the adjustment of debts, and has no bearing upon the present question.

It seems to follow from section 54 that the exemption by-law in question, not being a by-law relating to roads or streets, ceased to apply to the company's lands situate within the added area, on and from the first day of January, 1889, and that from that time these lands, and the company in respect thereof, became subject to the existing and subsequent by-laws of the town.

Judgment. The effect, therefore, of the exemption by-law was that
MACLENNAN, J.A. it was good for ten years, subject to the contingency of its being terminated in case of an extension of the town limits so as to include the company's property.

I am therefore of opinion that the appeal should be dismissed.

HAGARTY, C. J. O. :—

I agree.

Appeal dismissed with costs.

SCOTTISH AMERICAN INVESTMENT COMPANY V. PRITTE
 ET AL.

Railways—Mortgage—Arbitration—Rights of Mortgagee—Foreclosure—
R. S. O. ch. 170, sec. 20 (25).

A railway company took possession of certain lands under warrant of the County Court Judge, and proceeded with an arbitration with the owners as to their value. The lands were subject to a mortgage to the plaintiffs who received no notice of, and took no part in the arbitration proceedings, and gave no consent to the taking of possession. An award was made, but was not taken up by either the railway company or the owners. The plaintiffs brought this action against the railway company and the owners for foreclosure, offering in their claim to take the compensation awarded, and release the lands in the possession of the railway company :—

Held, that the railway company were proper parties to the action, and that the plaintiffs were entitled to a judgment against all the defendants with, in view of the offer, a provision for the release of the lands in the possession of the railway company on payment to the plaintiffs of the amount of the award.

Per OSLER and MACLENNAN, JJ.A.—Sub-section 25 of section 20, R. S. O. ch. 170, applies only where the compensation has been actually ascertained and paid into Court.

Judgment of GALT, C.J., reversed.

Statement. THIS was an appeal by the plaintiffs from the judgment of Sir THOMAS GALT, C. J.

The action was brought by the plaintiffs as mortgagees of certain lands in the city of Toronto and township of York, against the mortgagors and the Toronto Belt Line

Railway Company, who, under warrant of the county Court Judge, had taken possession of a portion of the lands, and had constructed their railway thereon. An arbitration had been held between the railway company and the mortgagors, but at the time of the bringing of the action the award, though made, had not been taken up by either party. The plaintiffs had received no notice of, and had taken no part in the arbitration proceedings, and had not given any consent to the taking of possession. The plaintiffs claimed payment of the mortgage moneys, and in default, foreclosure; payment by the mortgagors of the mortgage moneys with interest and costs; delivery by the defendants to the plaintiffs of possession of the mortgaged lands respectively occupied by them; asked that for the purposes aforesaid all proper directions might be given, and accounts taken; and prayed such further and other relief as the nature of the case might require. They also offered to release the lands in the possession of the railway company upon payment to them of the amount awarded. Statement.

The mortgagors did not enter any defence, and the pleadings were noted against them, and the action was then brought on for hearing on the 1st of November, 1892, by way of motion for judgment, before Sir THOMAS GALT, C. J., who gave the usual judgment for redemption or foreclosure as against the mortgagors, but dismissed the action with costs as against the railway company, holding that as to them it was in effect an action of ejectment, and that any claim to the lands was by force of sub-section 25 of section 20 of the Railway Act, R. S. O. ch. 170, converted into a claim against the compensation.

The plaintiffs appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 10th of March, 1893.

W. Cassels, Q. C., and *Lockhart Gordon*, for the appellants. This being an mortgage action, and the railway company being in possession of a portion of the lands

Argument. covered by the mortgage, they are necessary and proper parties: *Harty v. Appleby*, 19 Gr. 205. The learned Chief Justice was in error in treating this as an action of ejectment as against the railway company, the claim for possession being only an additional remedy sought by the plaintiffs in the action for foreclosure. The plaintiffs offered to accept whatever compensation had been awarded, and to release the lands occupied by the railway company, and under the prayer for general relief judgment should have been granted declaring the plaintiffs entitled to the amount of that compensation, whatever it might be: *Slater v. Canada Central R. W. Co.*, 25 Gr. 363. Sub-section 25 of section 20 of the Railway Act, R. S. O. ch. 170, refers only to cases where the compensation has been actually paid into Court, and until the company take up the award and pay into Court the amount awarded, the plaintiffs are entitled to judgment for the amount of the mortgages and in default of payment to sale: *Lincoln Paper Mills Co. v. St. Catharines and Niagara Central R. W. Co.*, 19 O. R. 106; *Slater v. Canada Central R. W. Co.*, 25 Gr. 363; *Harty v. Appleby*, 19 Gr. 205.

H. S. Osler, for the respondents. It is clear, under the very cases cited by the appellants, that no action to recover possession of the lands occupied by the railway company will lie, and any claim as against the railway company is, as held by the learned Chief Justice, converted into a claim against the compensation awarded.

Lockhart Gordon, in reply.

April 20th, 1893. BURTON, J.A.:—

This is a foreclosure suit, and the railway company being in possession of a portion of the mortgaged premises were proper and necessary parties to the suit.

Whether, if the railway company entered without the consent of the mortgagees, who had the legal title to the land, or without their being parties to the arbitration, they could be treated as trespassers and ejected, is not

material now to consider, as the mortgagees in the statement of claim offer to accept whatever compensation may be awarded, and release the lands so taken possession of from the mortgage.

Judgment.
BURTON,
 J.A.

Until the railway company have paid to the mortgagees the amount awarded, the plaintiffs are entitled to a decree against all the defendants for the amount of their mortgages, and in default to a judgment for the sale of the lands, the railway company on the other hand being entitled either to redeem the land, and to take an assignment of the mortgage, or on the submission of the plaintiffs to a release of their land from the mortgage on payment of the award.

The learned Chief Justice dismissed the action as regards the railway company, with costs. This was not the proper judgment even if we were to assume, as the learned Judge has done, that ejectment would not lie. There should be a foreclosure decree in the usual form against all the defendants, and the plaintiffs having agreed to accept the sum awarded, there may be a clause inserted that upon payment to them of the amount of the award they shall release the lands in possession of the company from the mortgage, which, as the mortgagees were not parties to the arbitration, the company might not otherwise be entitled to.

OSLER, J.A.:—

The plaintiff's prior mortgages being in default they have brought this action against their mortgagors, and the railway company, claiming foreclosure, delivery of possession by the company of those parts of the mortgaged land of which they are in possession, and such further and other relief as the nature of the case may require. And it appears to have been held in the Court below that the effect of this is that they are entitled to no remedy or relief under their mortgage against the railway company, as the action has been absolutely dismissed as against

Judgment.

OSLER,
J.A.

them. With all respect to the learned Chief Justice, this is too narrow a construction of the statute, at all events as against a prior incumbrancer, who has not been made a party to the arbitration, and where the award has not been taken up or published.

The incumbrancer is in my opinion in such case entitled to proceed upon his mortgage in the usual way.

In such a case as that at bar it cannot be said that the compensation has really been ascertained, and until that has been done it appears to me that sub-section 25 of section 20, R. S. O. ch. 170, cannot be invoked by the company against the incumbrancer. The company always have it in their own power to bring it into operation by proceeding with their arbitration and taking up the award. Sub-section 23 then enables them to defend themselves against further proceedings by the incumbrancer by paying the amount awarded "to the party entitled to recover the same," who is by sub-section 25 the incumbrancer to the amount of his claim. It is not for the latter to take up the award, paying the arbitrators' charges which he would probably have no right to recover back from any one, but it is for the company to entitle themselves to possession, or to defend themselves from further proceedings by ascertaining and paying the amount of the compensation.

When the award has been taken up the incumbrancer is no doubt entitled to recover the amount from the company: *Dunlop v. Township of York*, 16 Gr. 216, but until that has been done it is difficult to see what remedy the company would have if they are not entitled to enforce their mortgage. For anything that appears the railway company and the mortgagors would be content to let matters remain *in statu quo*, neither party being desirous of taking up the award.

The appeal should therefore be allowed, and an order made declaring that the plaintiffs are entitled to the usual judgment in a mortgage action, but that upon payment of the amount awarded, whatever it may be, the lands in the occupation of the company shall be released from their mortgage.

MACLENNAN, J. A.:—

Judgment.

MACLENNAN,
J.A.

I am, with great respect, of opinion that this appeal should be allowed.

In their statement of claim the plaintiffs in general terms pray for payment of their debt, and also for possession, and the prayer for possession in form includes the lands occupied by the railway company, but they also distinctly declare their willingness to accept the amount of the award as soon as made on account of their debt, and to release the lands taken by the company. Under these circumstances the prayer for possession of the land taken by the company must be regarded as a mere slip, by which the judgment ought not to be affected.

That being so, the compensation was part of the plaintiffs' security, and until it was ascertained or paid into Court, the railway company was a proper party to the mortgage action, and it ought not to have been dismissed. If the company do not pay, which might happen, the land is still part of the plaintiffs' security, and they are entitled to have the benefit of it.

The judgment should therefore declare the plaintiffs' right to enforce their security against the company as well as against the mortgagors, the company being entitled to a release of their right of way upon payment of the compensation when ascertained. The railway company must pay the costs of the appeal, and I do not see any principle on which they should either pay or recover any costs of the action. These must go according to the usual rule in mortgage actions.

HAGARTY, C. J. O.:—

I agree.

Appeal allowed with costs.

MACDONALD V. BALFOUR.

Assignments and Preferences—Partnership and Separate Estate—R. S. O. ch. 124, sec. 5—Assignee—Costs.

Where an assignment for the benefit of creditors is made by an assignor carrying on business by himself, creditors having claims against him for goods sold to a firm in which he was formerly a partner are entitled to rank against his estate rateably with creditors having claims for goods sold to the assignor alone.

Section 5 of R. S. O. ch. 124 does not apply to such a case, but only to the case of an assignor who has both separate estate and joint estate. The assignee for the benefit of creditors may be ordered to pay the costs of the action personally as any other unsuccessful litigant may be. Judgment of the Common Pleas Division affirmed.

Statement. THIS was an appeal by the defendant from the judgment of the Common Pleas Division, on the following case stated between the parties :—

T. J. Patten and William Maltas carried on business in partnership as general country merchants at the village of Little Current in the Province of Ontario, under the name and style of Patten & Maltas.

While carrying on business as aforesaid, the firm became indebted to the plaintiffs, who are wholesale dry goods merchants carrying on business as such in the city of Toronto.

The indebtedness was for a stock of dry goods sold and delivered by the plaintiffs to the firm prior to the month of February, 1888.

In the said month of February, and while indebted to the plaintiffs, the firm was dissolved, Maltas retiring, and Patten continuing to carry on the business, taking an assignment from Maltas of the assets of the co-partnership, consisting of the stock-in-trade and book debts of the business, and agreeing with Maltas to pay the debts of the firm and to indemnify Maltas against the same.

Payments were thereafter from time to time made by Patten on account of the indebtedness. Letters were thereafter written by Patten to the plaintiffs and by the plaintiffs to Patten in respect of the indebtedness.

The plaintiffs did not release Maltas from payment of the indebtedness, but claimed the right to obtain payment thereof from Maltas as well as from Patten, and on the 2nd day of February, 1889, the plaintiffs commenced an action in the High Court of Justice, Common Pleas Division, against Patten and Maltas for the amount of the said indebtedness. Personal service of the writ in the action was effected on said Patten and Maltas, and on the 7th day of March, 1889, the plaintiffs recovered judgment against the said Patten and Maltas for the amount thereof. Statement.

On or about the day of February, 1889, Maltas, who had subsequently to the dissolution aforesaid carried on a business as a merchant at Little Current, made an assignment for the benefit of his creditors, under the provisions of the Revised Statutes of Ontario, ch. 124, to one W. S. Gibbon.

The plaintiffs proved their claim against the estate of Maltas, and on the third day of July, A.D. 1889, received therefrom the sum of \$92.35, being the dividend payable to them out of said estate.

On the 15th day of March, 1889, Patten made an assignment to the defendant for the benefit of his creditors under the provisions of the said statute.

The plaintiffs duly proved their claim against the estate of the said T. J. Patten, on the 5th day of April, 1889, at the sum of \$896.94, being the balance of said indebtedness of said firm of Patten & Maltas.

The defendant, acting under and pursuant to a resolution of the creditors present at the first meeting of the creditors of said Patten, held under the provisions of the Act referred to, duly passed, although the plaintiffs protested against it, and on the advice of his solicitor, has refused to allow the plaintiffs and other creditors of Patten & Maltas to have any share or dividend out of the assets of the said estate in his hands, upon the alleged ground that creditors in respect of debts contracted by the said firm of Patten & Maltas are not entitled to receive

Judgment.
HAGARTY,
C.J.O.

property of Patten the plaintiffs recovered judgment against Patten and Maltas, and a few days after that judgment Patten made his assignment to defendant under the Assignments Act.

I cannot see on what principle the respondents could be refused their dividend. Section 5 of our Act does not seem to me to apply to this case. All the property assigned by Patten was liable to be taken in execution, and was his absolute property—no property therein existing in Maltas or any other person, although the latter remained liable to the creditors of the dissolved firm. Section 5 seems to me to relate to a state of things existing at the time of assignment, and provides for the case of debts due by the debtor individually and as a member of a co-partnership. Here the entire assets were his sole property, and as to this property the plaintiffs' executions could take it all, and any execution at the suit of a creditor of Patten alone after the old firm was dissolved could not claim any right of priority to the plaintiffs over any subsequently acquired property of Patten's.

BURTON, J. A. :—

I understand the appellant to contend that the decision of this Court in *Moorehouse v. Bostwick*, 11 A. R. 76, should not govern this case, inasmuch as the statute which was in force when that case was decided, has been altered by section 5 of the present Act, which introduces the provision to be found in the former Insolvent Act; and that this case should be governed by such decisions as *Re Walker*, 6 A. R. 169, governing the ranking on joint and separate estates.

I think the short answer to that contention is that no such question arises—the property assigned was not joint estate but property of the assignor and entirely at his disposal. Some portion of it, it is true, had at one time been the property of a co-partnership, in which Maltas was a partner, but he had sold out to Patten some time before, free from any equity in his former partner to have it applied in the payment of the partnership debts.

The assignment in the present case is under the statute of the assignor's separate and individual property, and the trust is for the purpose of paying rateably and proportionately and without preference or priority all his creditors.

Judgment.

BURTON,
J.A.

To bring section 5 into operation' the assignor must be assigning not only his separate estate, but also partnership estate, and in that case the distinction which existed under our former Insolvent Act would arise, the partnership creditors being in the first instance confined to the partnership assets, and the separate creditors to the separate estate of the assignor, and each ranking upon the other after the creditors of that other have been paid in full.

Here there is but one estate, and that estate was liable to execution at the suit of the firm creditors before the assignment.

All the partnership creditors and those who hold claims against Patten alone are his creditors, and entitled, I think, to claim under this assignment as they are entitled also to claim under Maltas' assignment.

In *Re Walker*, 6 A. R. 167, Mr. Justice Patterson found as a fact that there was joint and separate estate; and that being so the parties would rank in the manner pointed out in the Insolvent Act, similar to what is found in section 5, but that can have no application where a sole trader assigns and there is no joint or partnership estate.

OSLER, J. A. :—

If the contention of the defendant is right the plaintiffs would have the right to rank upon the estate of neither of their debtors until the several—not separate—creditors of each were paid in full. To my mind this section has no application to a case like this. It applies to a case where there is joint and separate estate, but not to prevent the assignor's joint creditors from competing with his several creditors. Here the estate assigned was not joint estate

Judgment.

OSLER,
J.A.

and could not properly be described as separate estate. It was simply the assignor's own estate or property, which he assigned for the benefit of his creditors, and the plaintiffs are his creditors just as they would be if their judgment had been recovered against him and some other joint debtor other than his former partner. Had there been no assignment the plaintiffs could have seized and sold it under an execution upon their judgment as the debtors own property absolutely. The case is within *Moorehouse v. Bostwick*, 11 A. R. 76, or the reasoning of that decision; and *Re Walker*, 6 A. R. 169, is distinguishable at all events on the ground that there was there an assignment of joint and separate estate.

The defendant complains of the form of the judgment, and also because he has been ordered to pay the costs. There was no suggestion at the trial that the assets were not sufficient to pay the plaintiffs the same dividend that had been already paid to other creditors, and therefore I think the judgment does not go too far in adjudging that they shall now recover the same from the assignee upon their claim as established in the action. He is sufficiently protected by the saving clause in the judgment, in the event of an ultimate deficiency in the assets. As to costs, the fact that the defendant is a trustee does not absolve him. He is the real as well as the nominal defendant, and he may be ordered to pay costs just as any other unsuccessful litigant may be ordered to pay them. A distinction is sometimes made with regard to an official liquidator who sues in the name of the company, at all events as to some proceedings taken by him, but even he may be ordered to pay costs in the first instance personally. The defendant may have a case for recovery himself out of the estate if there are funds, or may look for indemnity to the creditors at whose instance he required the plaintiffs to bring this action, but with that we have nothing to do: *Pitts v. La Fontaine*, 6 App. Cas. 482; *Ex parte Angerstein*, L. R. 9 Ch. 479; *Ferrao's Case*, L. R. 9 Ch. 355; *Fraser v. Province of Brescia Steam Tramways Co.*, 56 L. T. N. S. 771.

And as this action is, as I pointed out in *Whidden v. Jackson*, 18 A. R. 439, a statutory action brought and prosecuted in the Court as any other action, the jurisdiction to award costs to the successful party is of course, there being nothing to shew that it was intended that the Courts should not have such jurisdiction.

Judgment.

OSLER,
J.A.

The appeal should therefore be dismissed.

MACLENNAN, J. A.:—

The question is upon section 5 of R. S. O. ch. 124. At the time of the assignment there was no partnership estate at all; nothing but the individual estates of the partners.

I think in that state of things section 5 has no application. It says, "The claims shall rank first upon the estate by which the debts they represent were contracted." When there is no such estate that cannot be done; the directions of the section cannot be complied with. Here Macdonald & Co.'s debt was contracted by the partnership; but there is no partnership estate, therefore Macdonald & Co. cannot rank upon it; and the case does not arise in which they are prevented from ranking on the individual estates until the creditors of those estates are paid in full.

In *Re Walker*, 6 A. R. 169, there was joint as well as separate estate.

The appeal should be dismissed.

Appeal dismissed with costs.

MASON V. JOHNSTON.

Limitation of Actions—Judgment—Execution—Accord and Satisfaction—Part performance of Obligation—R. S. O. ch. 44, sec. 53 (7)—R. S. O. ch. 60, sec. 1—R. S. O. ch. 111, sec. 23.

A judgment remains in force for twenty years at least, the only limitation that can be applicable to it being R. S. O. ch. 60, sec. 1. In view of the amendment made in R. S. O. (1877) ch. 108, sec. 23, by the Revision of 1887, R. S. O. ch. 111, sec. 23, the English authorities, such as *Jay v. Johnstone* (1893), 1 Q. B. 189, and cases there cited, do not apply.

Boice v. O'Loane, 3 A. R. 167, followed.

Part payment of a judgment must, to be an extinguishment thereof, be expressly accepted by the creditor in satisfaction. Where therefore the judgment debtor forwarded to the solicitor of the judgment creditor a bank draft, payable to the solicitor's order, as payment "in full," and the solicitor endorsed the draft and obtained and paid over the moneys to the judgment creditor, but wrote refusing to accept the payment "in full" the judgment creditor was allowed to proceed for the balance.

Day v. McLea, 22 Q. B. D. 610, applied.

Sec. 53, sub-sec. 7, Judicature Act, as to part performance of an obligation in satisfaction, considered.

Order of the County Court of Wellington affirmed.

Statement.

THIS was an appeal by the defendant from an order of the County Court of Wellington, made on the 9th of January, 1893, allowing the plaintiff to issue execution for \$66.36, balance of a judgment recovered in that Court on the 26th of December, 1877, and was argued before HAGARTY, C.J.O., OSLER, and MACLENNAN, J.J.A., on the 21st of March, 1893.

John McGregor, for the appellant.

E. F. B. Johnston, Q. C., for the respondent.

The facts, arguments, and cases cited, are stated in the judgments.

April 20th, 1893. OSLER, J. A.:—

The two questions argued on this appeal were, (1) Whether the judgment was barred, as the defendant contended, by the Statute of Limitations; and (2) whether it had been extinguished by the payment by the defendant and acceptance by the plaintiff of the sum of \$100, being

less than the whole amount due thereon, in satisfaction and discharge of the whole, within the meaning of R. S. O. ch. 44, sec. 53 (7.)

Judgment.

OSLER,
J.A.

The judgment was recovered on the 26th December, 1877. Execution issued thereon about the same time, and the sum of \$34 was paid on account in April, 1878. Nothing more was paid until the 18th November, 1892, when \$100 was paid under the circumstances which I shall presently mention, and on which the defendant relies in support of his second objection.

It appears to me that there is nothing in the first point. In *Boice v. O'Loane*, 3 A. R. 167, it was held by this court as then constituted, reversing the decision of Gwynne J., in the same case, 28 C. P. 506, that section 11 of 38 Vic. ch. 16, (O.) R. S. O. (1877), ch. 108, sec. 23, "The Real Property Limitation Act" did not apply to a judgment, and that an action might be brought thereon, as being a specialty within twenty years from the time of its recovery under C. S. U. C. ch. 78, sec. 7; R. S. O. (1877), ch. 61, sec. 1, and now R. S. O. ch. 60, sec. 1: "An Act respecting the Limitation of certain Actions." It was enacted by the section in question of the former Act that "no action suit, etc. should be brought to recover any sum of money secured by any mortgage judgment or lien or otherwise charged upon or payable out of land, etc., but within ten years next after a present right to receive the same had accrued to some person capable of giving a discharge therefor, or within ten years after some payment of some part of the same or of interest or some written acknowledgment had been given, etc., and it was held in *Boice v. O'Loane*, that inasmuch as judgments did not operate as charges upon land there was no subject matter to which that part of the section which relates to judgments was applicable, and consequently that the ten years' bar imposed by that section did not affect judgments. The reasoning of the late Chief Justice Moss, by which that conclusion was arrived at, is to my mind convincing; but if the change in the section to be presently noticed had not been made in the revision of 1887 we should

Judgment

OSLER,
J.A.

probably have found ourselves compelled, in obedience to the general rule laid down by the Privy Council in *Trimble v. Hill*, 5 App. Cas. 342, and *City Bank v. Barrow* 5 App. Cas. 664, to follow the case of *Jay v. Johnstone*, [1893] 1 Q. B. 189, in which the Court of Appeal, dealing with a section verbally identical in this respect with the section of our Act as it formerly stood, and also with other Imperial Acts similar to those in force here, which were considered by our Court in *Boice v. O'Loane*, came to a conclusion diametrically opposite to that decision. In confirming the statute law revision of 1887 the Legislature has, however, adopted the law as laid down in *Boice v. O'Loane*, by omitting the word "judgment" altogether from section 23 as revised in R. S. O. ch. 111, so that there is no longer anything in that section which in terms includes judgments, or to which the reasoning of the English decisions can apply. *Jay v. Johnstone* is also reported in [1893] 1 Q. B. 25, and follows the case of *Hebblethwaite v. Peever*, [1892] 1 Q. B. 124.

The only Limitation Act therefore which can apply to a judgment, regarding it as a specialty, (as to which see the cases last cited, and *McMahon v. Spencer*, 13 A. R. 430), is R. S. O. ch. 60, sec. 1.

It remains to be seen whether the defendant has brought himself within sub-section 7 of section 53, of the Judicature Act, by which it is enacted, in derogation of the rule of law recognized in the old case of *Cumber v. Wane*, 1 Str. 426, and confirmed in that of *Foakes v. Beer*, 9 App. Cas. 605, that "part performance of an obligation either before or after a breach thereof, (1) when expressly accepted by the creditor in satisfaction; or (2) rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation."

Assuming that a judgment is such an obligation as may come within the statute, the first question is, whether there was an agreement to accept \$100 in satisfaction of the balance due upon the judgment. The section seems to imply that there may be a previous agreement without any

new consideration to accept part performance of the obligation in satisfaction, and that if such part performance is afterwards "rendered," it may be sufficient, even though the creditor has in the meantime repudiated or withdrawn from the agreement, and will not accept such part performance in satisfaction of it. It is not now necessary to decide this point, and I will only say that at present I am not satisfied that this is the proper construction to be placed on the section.

The plaintiff's letter on which the defendant relies in proof of such agreement, is said to have been lost. It was written on the 6th October, 1892, and the parties do not agree upon its exact terms. The defendant says it contained a proposal that the plaintiff should draw upon him at one or two months for \$100 in full of his claim against him in the matter.

The plaintiff, on the other hand, says that he at one time offered to accept an immediate payment of \$100 in full, but the offer was not accepted.

The loss of the letter is unimportant, for it is very clear that whether the proposal was that stated by the defendant, or that stated by the plaintiff, it was not accepted. On the 21st October, the defendant writes to the plaintiff acknowledging receipt of the letter of the 6th, and goes on to say that he had written him on the 7th October, enclosing a cheque for \$50, but that owing to the failure of a customer, his bank account had become demoralized, and so he had not sent either letter or cheque.

"My cheque (he says) was to settle your account against me in full, subject, of course, to your acceptance of it. I think you ought to be satisfied with \$50. It is not my way to pay anything twice over. It is too bad I could not send you the money when you wrote, but I will make an effort to let you have it soon after November 1st. What you say as to friendship and \$100 is noted. You may be sure that if our position had been reversed, you would never to the end of time have been sued by me. Your methods and mine are different, and that is all that

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

can be said. Let me know if my proposition is agreeable to you, so that I may carry it out about 4th or 5th November." The plaintiff did not reply to this letter. On the 28th October he had written to the solicitor who had obtained judgment for him in the action, asking for particulars of it in order to proceed to issue a new writ of execution, and on the 28th October, on receipt of his answer, wrote him again with instructions to proceed, or to instruct some other solicitor to do so for him. In the same letter he encloses "a letter from Johnston in reply to a letter I wrote him offering a settlement of the case upon immediate payment of \$100," and adds, "I think his answer meant the prosecution of my claim for the full amount." This no doubt refers to defendant's letter of 21st October. After this Mr. Cutten, the plaintiff's present solicitor, appears to have written defendant demanding payment, and to have received from him a letter dated 3rd November, in which he says, "I will look into Mr. Mason's matter and ascertain amount due him, and settle the same with you in a few days. Cutten advises the plaintiff on the 4th November of this letter. The plaintiff replies with a long statement of his case on the 5th November. Mr. Cutten wrote defendant again on the 11th November a letter not produced, and thus the matter stood until the 17th November, when the defendant wrote to him enclosing draft "in full for Mason's claim, accepting his offer as per his letter to me."

Whether the plaintiff can be said to have accepted this draft in satisfaction of his claim is a matter which I will presently consider, but it is manifest from the correspondence that it had not been sent in pursuance of any agreement that he should so send it, or if sent, that it should be accepted in satisfaction. The case, therefore, is not within the second branch of the section. The only offer made was that contained in the letter of the 6th November, and the defendant's letter of the 21st November shews that it was not accepted by him, and there is no pretence that it was ever renewed.

Then was the draft expressly accepted by the creditor

in satisfaction of the obligation within the meaning of the statute ?

Judgment.

OSLER,
J.A.

It was payable to the defendant's order ; he endorsed it thus : " Pay to the order of W. H. Cutten in full re Mason," and enclosed it in the letter of the 17th of November, the terms of which are above referred to. The solicitor answered on the 18th November : " I have your favour of the 17th instant, enclosing bank draft for \$100 on the terms that Mason should receive it in full. I now beg to advise you that Mason declines to accept it in full of his claim, and requires a cheque for the balance, \$66. There is and has been no agreement to accept \$100 in satisfaction. Mason's offer to accept \$100 in immediate payment was declined in subsequent correspondence." To this, on the 24th, the defendant replied : " The draft I sent you was in full as stated in my letter, and was endorsed upon the draft. Mason's offer was not for immediate cash, but was for a draft at one or two months. That offer was not withdrawn, and was not refused by me, but on the contrary I accepted it, and sent cash instead of taking the time as I was entitled to do."

The plaintiff confirmed his solicitor's action accepting the \$100 on account of his claim, and refusing in peremptory terms to accept it in satisfaction.

What the statute requires in order that the debtor may be able to avail himself of it is that the part performance of his obligation shall be expressly accepted by the creditor in satisfaction of it. It merely enables the parties to make a valid and binding accord and satisfaction in a case where it could not have been made before the statute. I was at first disposed to agree with Mr. McGregor that the plaintiff could not cash the draft and retain the money, and at the same time repudiate the condition on which the defendant sent it ; but further consideration has shewn me that this view cannot be supported. The defendant owed the money and it was his duty to pay it, and the case cannot be put on higher ground than if the parties had personally met and the defendant had said to the plaintiff : " Here, I hand you \$100 " (or a cheque or draft), " provided you take

Judgment.

OSLER,
J. A.

it," (or you must take it), "in full of your judgment," and the plaintiff, taking it, had said: "I will take it, but I certainly will not take it in satisfaction. You owe me the debt and must pay it, and I will not agree to throw off a sixpence." The defendant could not under such circumstances recover back the money or cheque, and he would find it very difficult to persuade a tribunal that it had been accepted in satisfaction by the creditor. The difference here is that the parties are not brought together, and there is an interval between the time that the creditor obtains the cheque and the time he informs the debtor of his refusal to take it on the terms on which he had sent it. The plaintiff relied on the case of *Day v. McLea*, 22 Q. B. D. 610, which, on the argument, I thought might prove to be distinguishable.

It seems, however, to be precisely in point, turning strictly on the question whether the facts proved an accord and satisfaction. There the plaintiffs made a claim against the defendant for damages for breach of contract, and the defendant sent a cheque for a less amount, stating that it was in full of all demands. The plaintiffs kept the cheque, stating that they did so on account, and brought an action for the balance of their claim. It was held that keeping the cheque was not, as a matter of law, conclusive that there was an accord and satisfaction of their claim, but that it was a question of fact on what terms the cheque was kept. Lord Esher, after stating the argument on both sides, says: "That argument raises the question whether the fact of keeping a cheque sent in satisfaction of a claim for a larger amount is in law conclusive that there has been an accord and satisfaction. It is said that that inference of law must be drawn, even though the person receiving the cheque never intends to take it in satisfaction, and says so at the time he receives it. All I can say is, that if that is a conclusive inference, it would be one contrary to the truth. I object to all such inferences of law." And per Bowen, L. J.: "Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question

of agreement, there must be either two minds agreeing, or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim and to cause him to act upon that view."

As is pointed out in the judgments in that case such facts as we have before us may be evidence from which accord and satisfaction may be inferred, but the judge is not bound as a matter of law to draw that inference: and here I think he might well reject it not merely because of the plaintiff's express refusal to accept the draft in satisfaction, but also because in sending it the defendant professed that it was sent in acceptance of an existing proposal on the part of the plaintiff to accept such amount in full, which was contrary to the facts.

See also *Bidder v. Bridges*, 37 Ch. D. 406: *Brown v. Shaw*, 1 A. R. 293. The defendant has, in my opinion, failed to make out an express acceptance of the draft in satisfaction of the judgment, and the learned Judge below has so held. His judgment ought, therefore, to be affirmed.

I wish to add that I am not to be understood as affirming that any order for leave to issue execution was necessary, it appearing that execution had in fact been issued within six years from the recovery of the judgment. See Consolidated Rule 885; *McMahon v. Spencer*, 13 A. R. 430.

MACLENNAN, J. A. :—

I think this appeal fails. Rules 885 and 886 are inapplicable, because execution was issued immediately after judgment, and the present execution is a *fi. fa.* residue, a mere continuation of the execution which was awarded in 1877 or 1878.

I do not think the statute, R. S. O. ch. 60, sec. 1, applies, for that relates to the bringing of actions, but if it did, the twenty years have not run.

If the Revised Statute of 1877, ch. 208, sec. 23, was applicable, as perhaps it was, owing to the use of the word proceeding, "no action, suit, or other proceeding," etc.,

Judgment.

OSLER,
J. A.

Judgment. that was repealed on 31st December, 1877, before the ten years had run, and the new section in the Revised Statute of 1888, does not apply to judgments at all. The payment had been made in April, 1878.

MACLENNAN,
J.A.

But it is said that the debt was satisfied by the payment of \$100 before the application for the order now appealed from.

I think *Day v. McLea*, 22 Q. B. D. 610, is a complete answer to that contention. That was not a case within the rule in *Cumber v. Wane*, 1 Str. 426, because it was an action for damages, the amount claimed being uncertain, and the sole point determined was one of evidence. It was held that the retention of the cheque did not estop the plaintiff from proving that he did not accept it in satisfaction of his whole demand. In the present case, the endorsement on the draft had no more effect than what was stated in the letter, that it was to be taken in full. Mr. Cutten refused to accept it in full, and immediately informed the defendant of his refusal.

It follows that this payment was not accepted in satisfaction within the meaning of section 53 of the Judicature Act. If it had been so accepted it would have been an extinguishment of the judgment debt, and the plaintiff would not have been entitled to issue execution.

I think it is more than doubtful, too, whether the plaintiff could be held bound by the mere fact that Mr. Cutten had endorsed the draft. It was drawn payable to his order, but his instructions were express to secure the whole debt, and not to accept part in satisfaction. Not only were these his instructions, but he had no intention to disregard them, and so informed the defendant.

I also desire not to be taken to express any opinion that an order was necessary before issuing this execution, although I think it was not improper to obtain it.

HAGARTY, C. J. O.—

I agree.

Appeal dismissed with costs.

LEMESURIER V. MACAULAY.

Revivor—Ejectment.

An action of ejectment was brought in 1867 and was entered for trial in that year, but the trial was postponed. The original plaintiff died in 1871, having several years before conveyed the lands to a person who in 1888 conveyed to one M. In 1892 an *ex parte* order of revivor was obtained in the name of M. as plaintiff:—

Held, affirming the judgment of GALT, C.J., 22 O. R. 316, discharging the order of revivor, that the action was governed by C. S. U. C. ch. 27 and that it came to an end as soon as the conveyance to the present plaintiff's predecessor in title was made except perhaps as to costs, for which the original plaintiff might probably have proceeded.

THIS was an appeal by the plaintiff from the judgment Statement.
of GALT, C. J., reported 22 O. R. 316.

The action was an action of ejectment for lands in the township of Murray and was commenced by writ issued in the (then) usual form on the 28th of August, 1867. The plaintiff was Henry Lemesurier, and the defendants were Margaret Macaulay and Henry Macaulay. The plaintiff claimed title by a deed to him bearing date the 29th of August, 1848, from L. T. Macpherson and others. The defendants entered an appearance in the action on the 17th of September, 1867, and claimed title to fifty acres, part of the lands in question, under a devise from one Henry Macaulay to Margaret Macaulay for life, with remainder to Henry Macaulay in fee, and as to the other fifty acres as lessees of one Jane McGuire, devisee in fee under the same will.

Notice of trial of the action was given for the Cobourg Assizes, commencing on the 16th of October, 1867, and was subsequently countermanded. The record was entered for trial at the Cobourg Assizes of March, 1870, but was withdrawn on the 28th of March, both the countermand and withdrawal having been, as was alleged, at the request of the attorney for the defendants, since deceased. On the 21st of October, 1867, the plaintiff Lemesurier had conveyed the lands in question to one George Irvine in fee, and on the 8th of January, 1871, died. With the

Statement. exception of a notice given on the 23rd of March, 1879, of intention to proceed by reviving the suit and giving notice of trial for the Spring Assizes of that year, which was abandoned, or said to have been abandoned, as the result of an agreement made between the solicitors of the parties on the following day no further proceedings were taken until the 6th day of February, 1892, when an order of revivor was granted *ex parte* by the local Registrar at Cobourg, substituting as plaintiff one Catharine MacLellan, who claimed under a deed from Irvine of the 14th of May, 1886. This order set out the title of Catharine MacLellan under the deeds from the plaintiff and Irvine; the death of the plaintiff in 1871; certain changes of title among the defendants by which the Laffertys, hereinafter named, became interested, and contained the provision that the suit should stand revived "at the suit of the said Catharine MacLellan as plaintiff against the said defendant, Henry Macaulay, and the said Jane Lafferty and James Lafferty, as defendants, and be in the same plight and condition as the same was in at the time of the abatement."

Upon the application of the defendants this order was discharged on the 7th of March, 1892, by GALT, C. J., several affidavits being filed on each side. It was shewn that Lemesurier was merely a trustee and had conveyed to Irvine as a new trustee, and there was much contradictory evidence as to the agreement entered into between the solicitors in 1879.

The plaintiff appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 27th and 28th of March, 1893.

W. R. Meredith, Q. C., and *F. A. Hilton*, for the appellant. The order made by the local Registrar was justified by the practice on the facts of this case. There has here been merely a passing of interest and the original title has always remained in force. There has never been in fact

any change in the beneficial ownership, but a mere devolution of the legal estate. It might be different if a hostile title had been acquired, pending the action, as against the original plaintiff, but where there is a mere passing of interest, the suit could be continued in the name of the original plaintiff for the benefit of the new interest, and *a fortiori* could be revived: *Knight v. Clarke*, 15 Q. B. D. 294. Even before the Common Law Procedure Act a practice equivalent to revivor was allowed: *Doe dem. Grubb v. Grubb*, 5 B. & C. 457. Clearly under the Chancery practice the present order would be proper. That practice will be found in Mitford on Pleading, 4th ed., p. 64. Revivor is a matter of discretion, and in *Curtis v. Sheffield*, 20 Ch. D. 398, revivor was allowed after an abatement of twenty years. C. S. U. C. ch. 27, does not apply to the present case, which should be governed by the new practice under Consolidated Rules 620, *et seq.*: *Lowes v. Lowes*, 1 W. R. 14.

Marsh, Q. C., for the respondents. The common law provisions as to revivor will be found in C. S. U. C. ch. 27, sec. 21, *et seq.*, and it will be seen that all these provisions refer only to abatement by death, marriage, or operation of law, but no provision can be found therein allowing proceedings in the nature of proceedings of revivor to be taken where a voluntary transfer of interest has been made. That was looked upon as a species of maintenance. Even under the Chancery practice there was no right of revivor in case of transmission of interest, there being a clear distinction between such a transmission of interest and the acquisition, for instance, of a title by descent. It has been held that an heir may revive but that a devisee may not revive: *Harrison v. Ridley*, Comyn 589; *Dunn v. Allen*, 1 Vern. 283; *Osborne v. Usher*, 6 Bro. P. C. 20; Pemberton on Revivor, p. 45. Where an ordinary bill in the nature of a bill of revivor was filed, all the original rights were kept alive, and the defendants were not entitled to set up any new defence. If, however, there were a voluntary transmission

Argument.

Argument. of interest, an ordinary bill in the nature of a bill of revivor could not be filed, but a supplemental bill had to be filed, and then all defences were open and the Statute of Limitations could be set up: *Pemberton on Revivor*, pp. 38 to 42. Even under the wider Chancery practice introduced by Imp. Stat. 15 & 16 Vic., ch. 86, sec. 52, it was at first held that where a sole plaintiff had assigned his interest before decree, no revivor was possible: *Williams v. Williams*, 9 W. R. 296; *Laurie v. Crush*, 32 Beav. 117. These cases were overruled by *Eyre v. Brett*, 34 Beav. 441, but they are useful as emphasizing the distinction between abatement by death and abatement by transmission of interest. It was under the Judicature Act that revivor in case of assignment of interest was first allowed, but that Act cannot be invoked here: *In re The Kate Moffatt*, 15 C. L. J. 284; *Taylor v. The Queen*, 1 S. C. R. 65, for this is not a mere question of procedure or practice. The right had actually gone, and the new Act cannot apply. Apart from the effect of the Statute of Limitations, under which the defendants have, it is submitted, obtained an absolute title, the rights of the plaintiff are barred because of laches: *Bland v. Davison*, 21 Beav. 312; *Alsop v. Bell*, 24 Beav. 451. The rule was different where a judgment or an order in the nature of a judgment had actually been obtained, and *Curtis v. Sheffield*, 20 Ch. D. 398, is a case of that nature. The agreement entered into by the solicitor can have no effect, for the authority of the solicitor had ended with the abatement, and even if not he had no right to enter into an agreement so prejudicial to his clients without their direct authority.

W. R. Meredith, Q. C., in reply.

May 9th, 1893. OSLER, J. A. :—

It may be convenient first to notice the law in force when this action was brought, and at the date of the plaintiff's conveyance to Irvine, and of his death, regulating the procedure and practice in actions of ejectment.

This was C. S. U. C. ch. 27, taken, with the exception of the sections relating to vexatious defences, and overholding tenants, and sections 78, 79, and 80, from the C. L. P. Act, (1856) 19 Vic. ch. 43. Previous to that Act all fictions of law in this form of action had been abolished by 14 & 15 Vic. ch. 115 (repealed by the C. L. P. Act), which provided a code of practice for the action and placed it on the same footing as other actions between parties, though under this Act as well as the C. L. P. Act, the action, though brought and defended by the real parties in interest, continued to be, as it had always been, strictly a possessory action. It was now commenced by writ in the form given by the statute (C. L. P. Act), directed to the person in possession by name: "and to all persons entitled to defend the possession of (describing the property), to the possession whereof A., B. and C. (the plaintiffs), some or one of them, claim to be (or to have been on and from the day of A.D.) entitled, and to eject all other persons therefrom." By section 21 it was enacted that the question at the trial should be whether *the statement in the writ* of the title of the claimant was true or false, and if true, then which of the claimants was entitled, and whether to the whole or part, and if to part, then to which part of the property in question, and the entry of the verdict might be made in the statutory form, or to the like effect with such modifications as might be necessary to suit the circumstances of the cases, viz: "That A. B. (the claimant) on the day of (the date stated in the writ) was *and still is entitled to the possession* of the land within mentioned as in the writ alleged."

Judgment.

OSLER,
J.A.

The only provisions on the subject of abatement of the suit are those which relate to the death of the parties.

Section 31 enacted that the death of the claimant or defendant should not cause the action to abate, but it might be continued as thereafter mentioned. This in the case of the death of a sole claimant was by section 35.

Judgment.

OSLER,
J.A.

which provided that in that case *the legal representative* of the claimant might by leave of the Judge enter a suggestion of the death, and that he was such legal representative, and thereupon the truth of the suggestion if made before the trial, was to be tried thereat, together with the title of the claimant. Further provision was made for the case of the death occurring after trial and before execution.

A conveyance by the claimant of his interest and right of entry and possession *pendente lite* is not in contemplation of the Act, but section 22 makes special provision for the case of the claimant's title expiring before trial. "In case the title of the claimant as alleged in the writ,—i. e., his title to possession—existed at the time of service thereof but had expired before the trial, the claimant shall, notwithstanding, be entitled to a verdict, according to the fact, that he was entitled at the time of serving of the writ, and to judgment for his costs of suit."

It was hardly to be expected that a precedent would be found for an order of the nature of that now in question under the old practice prior to the Common Law Procedure Act, either in the case of real actions or in the action of ejectment where the latter was between fictitious parties, the nominal plaintiff John Doe (whose vitality was indestructible, and to allege whose death was a contempt), claiming under a supposed lease from "the lessor of the plaintiff" whose title to demise the property claimed, on the day of the demise, was the question to be tried; for in the latter case the right of the nominal plaintiff on the record (to whom alone for this purpose the Court had regard), to the term supposed to have been granted to him by his alleged lessor, could not be affected by the latter's conveyance of the reversion; and in the former, because the maxim of the common law as laid down by Coke was that nothing in action, entry, or re-entry could be granted: Co. Litt. 214, sec. 347. While a right of entry remained unassignable, revivor in the name of a purchaser or assignee must have been unknown, the sale being void and passing no title nor capable of being set up by the defendant as a defence to a pending action.

In *Doe dem. Byne v. Brewer*, 4 M. & S. 300, it was held that the lessor of the plaintiff could not release the action. "Looking to the record," said Lord Ellenborough, "we must consider those as real parties to the action who are parties upon record. For other purposes indeed we treat it as it really is as a fictitious action, but as matter upon the record it must be taken as if really between the parties to it."

Judgment.

OSLER,
J.A.

The question arose in a case in the Supreme Court of the United States: *Robinson v. Campbell*, 3 Wheat. 211, 223, (n). In disposing of it, the Court say: "The question is, whether the Circuit Court decided correctly in rejecting the deed of conveyance from the plaintiff's lessor to Arthur L. Campbell for the land in controversy, made during the pendency of the suit. The answer that was given at the bar is deemed decisive; although an action of ejectment is founded in fictions, yet to certain purposes it is considered in the same manner as if the whole proceedings were real, for all the purposes of the suit the lease is to be deemed a real possessory title. If it expire during the pendency of the suit, the plaintiff cannot recover his term at law without procuring it to be enlarged by the Court, and can proceed only for antecedent damages. In the present case the lease is to be deemed as a good subsisting lease, and the conveyance by the plaintiff's lessor during the pendency of the suit could only operate upon his reversionary interest, and consequently could not extinguish the prior lease."

See also *Williams v. Jackson*, 5 Johns. 489; *Wolcott v. Knight*, 6 Mass. 418. So too the death of the sole lessor of the plaintiff did not abate the action, and it might be continued in the name of the nominal plaintiff: *Doe dem. Egremont v. Stephens*, 2 D. & L. 993; *Doe dem. Baylor v. Neff*, 3 McLean 302, though the defendant was then entitled to security for costs.

The case sometimes arose of the title of the lessor of the plaintiff *expiring*, or becoming devested, during the suit as where he was tenant for life and died: the Court would

Judgment.
OSLER,
J.A.

not stay the proceedings : *Thrustout dem. Turner v. Grey*, 2 Str. 1056 : "Though the possession cannot be obtained, yet the plaintiff has a right to proceed for damages and costs : all we can do is to oblige him (i. e. the nominal plaintiff *Thrustout*) to give security for costs."

Doe dem. Morgan v. Bluck, 3 Camp. 447, was an action of ejectment brought by a rector against his tenant of glebe land : pending the action a writ of sequestration was issued, and from the date of its being read in the parish church the rector ceased to be entitled to the possession. It was held that though he was not entitled to recover possession, yet ejectment was maintainable in order to enable him to recover the mesne profits of the land from the time the tenant should have quitted possession until the publication of the sequestration. This was not exactly a case where the lessor's title had expired. He was deprived of it by the course of legal proceedings against him. But as regarded his right to judgment on the action of ejectment the Court said it might be compared to the former case. See also *Jackson dem. Henderson v. Davenport*, 18 Johns. 295 ; 2 Roscoe on Real Actions, p. 497.

Section 22 of our Ejectment Act therefore only preserved the old practice in so far as it could be made applicable. Mesne profits, except in the case of landlord and tenant, were no longer recoverable in ejectment, but the plaintiff was entitled to a verdict according to the fact that he was entitled at the time of serving of the writ and to judgment for his costs of suit. The cases of *Gibbins v. Buckland*, 1 H. & C. 736, and *Knight v. Clarke*, 15 Q. B. D. 294, shew that in an action between landlord and tenant the former may have his writ of possession, notwithstanding that his title as between himself and his superior landlord has expired, because as against him, his immediate tenant has not shewn that he has acquired any right and unless there be evidence that the plaintiff, who has recovered in such an action, has no title whatever, he is entitled to have possession given to him.

In *Murray v. Garretson*, 4 Serg. & R. 130, it was held that a plaintiff in ejectment who had conveyed the title pending the suit, might still proceed with the action to recover damages and costs. The Court say they can see no distinction whether the title expires by its own limitation, by death, or by the act or conveyance of the party. "During the pendency of the ejectment the party's necessities may compel him to sell, or it may suit his convenience to do so, or there may be a sale by the sheriff. It would be manifestly unjust that he who had a good cause of action for two things, damages and the possession, because he had parted with his title to one should lose both. * *

The reason why, after there is an end of the title of the plaintiff pending the ejectment, he may recover damages and costs, is because the defendant unjustly withheld the possession, at the time the action was brought. It would appear in principle and in justice that this reason held equally in all cases where there is an end of such title, let its destruction arise from what cause it may." See also *Fenn v. Stille*, 1 Yeates 154; *Rugan's Lessee v. Philips*, 4 Yeates 382. Under our statute, as I have said, mesne profits were not, with one exception, recoverable in the action of ejectment itself.

Judgment.

OSLER,
J.A.

Nothing in these cases, or in section 22 of the Ejectment Act, or the old law which it re-enacts, can aid the respondent, the plaintiff by revivor, for the question before us is not whether Henry Lemesurier, the plaintiff in the action, could after his conveyance have continued the action, or whether his legal representative after his death could have revived and continued it for the purposes mentioned in section 22, but whether Irvine could have procured himself to be substituted as plaintiff in the action instead of his grantor Lemesurier.

It appears to me, when the nature of the modern action of ejectment, the creature of the Common Law Procedure Act, is considered, that a purchaser could have no such right. It is not given by the Act, and every analogy derived from the ancient practice is opposed to it. The

Judgment.

OSLER,
J.A.

action was peculiarly the action of the person by whom it was brought, to try whether he was entitled, as he alleged, to the possession of the premises at the date mentioned in the writ. If he recovered judgment his title was so declared thereby, and he could thereafter proceed in an action of trespass to recover the mesne profits from the day named in the writ, down to the day on which he recovered possession.

If he did not prove himself entitled at the alleged date he failed. If then a purchaser from him *pendente lite* could come in and be substituted as plaintiff, what judgment was to be given? He certainly was not entitled at the date of the writ, for his title accrued after the action had begun; and therefore by the very terms of the Act no judgment in his favour was possible. No provision is made for merely adding him as plaintiff, so that there might be two judgments, one in favour of the original plaintiff declaring his title at the date mentioned in the writ and for his costs; and another in favour of the purchaser, declaring his title to possession as at the date at which he acquired it with costs, thus trying in the same action the possessory titles of two distinct persons. No proceeding of this kind is contemplated by the Act. It was intended to provide only for the case of the death of a claimant, whether a sole claimant or one of several; and in the former, to revive in the name of his legal representative; and for the further case of the expiration of the claimant's title before the trial, when the suit might be continued for the purposes specified in section 22.

The respondent has been able to refer us to no case in which a purchaser *pendente lite* has been added or substituted as a plaintiff or co-plaintiff in an action of ejectment since the passage of the Common Law Procedure Act, and during all that time assignments of rights of entry have been legal. I do not think it necessary to say that the plaintiff's conveyance of October, 1867, abated the action. But the suit either terminated then, or the plaintiff's right was continued so far only as might be necessary

to obtain a judgment as to his title when he commenced the action and for his costs.

Judgment.

OSLER,
J.A.

When Lemesurier died in 1871, there was no suit in existence of which Irvine could take advantage or which he could carry on, and *a fortiori* the respondent, his grantee, under a deed made fifteen years afterwards, cannot be in a better position. These considerations, it appears to me, dispose of the argument that under the provisions of the Judicature Act the respondent was properly made a party to the action. It was Lemesurier's action alone, and the only question in it was his right at the date of the writ, not the respondent's at a date nineteen or twenty years afterwards. And for the same reasons the respondent cannot avail herself of the agreement made in January, 1879, between the solicitors for the then defendants, and the solicitors who professed to act for Lemesurier, who was then dead. At the time of his death he was no longer entitled to possession; and I doubt whether his representative could have revived the suit for any purpose; but how can the respondent, whose interest in the land did not arise until many years afterwards, say that she is in a position to take advantage of it?

There is a case of *Bolling v. Teel*, 76 Va. 487, which is in favour of the respondents, so far at all events as it decides that the conveyance by two or more of several plaintiffs *pendente lite*, would not affect their right to prosecute the action to judgment and execution.

The sections of the Virginia Code seem to be substantially the same as the sections I have quoted from our Ejectment Act, but I am not prepared to adopt the views expressed in that case as to the meaning of those sections. I may refer also to *Lessee of Brown v. Galloway*, 1 Peters (C. C.) 291; *Young v. Irwin*, 1 Haywood 371. As to mesne profits, see *Pearse v. Coaker*, L. R. 4 Exch. 92; *Harris v. Mulkern*, 1 Exch. D. 31.

I think the judgment of the learned Chief Justice was right, and that the appeal should be dismissed.

Judgment. **MACLENNAN, J. A. :—**

MACLENNAN,
J.A.

When this action was brought, and until the passing of the Judicature Act of 1881, the Act which governed procedure in ejectment was the Ejectment Act, C. S. U. C. ch. 27, and R. S. O. (1877) ch. 51. The object of the action of ejectment was to recover possession of land, and the writ was to contain a notice to the defendant that in default of appearance he would be turned out of possession. Section 25 declared that the question at the trial was to be whether the statement in the writ of the title of the plaintiff was true or false. The form of judgment for the plaintiff prescribed by the Act was that the plaintiff was on a certain day, and still is, entitled to the possession of the land ; and by section 31 it was declared that in case the title of the plaintiff, as alleged in the writ, existed at the time of the service thereof, but had expired before the trial, the plaintiff should notwithstanding be entitled to a verdict according to the fact, that he was entitled at the time of the serving of the writ, and to judgment for his costs of suit.

Our Ejectment Act was in the first instance part of the Common Law Procedure Act of 1856, and had been taken from the corresponding clauses of the English Common Law Procedure Act of 1852. At that time by 14 & 15 Vic. ch. 7, sec. 5, such a conveyance as was made by Lemesurier to Irvine was perfectly valid ; and so the conveyance of the 21st October, 1867, divested the title to the land in question out of the plaintiff to all intents and purposes, and vested it in Irvine.

It is evident that the action of ejectment was a purely possessory action. The wrong it was intended to redress was the detention from the plaintiff of the use and possession of his land. That wrong continued as long as the plaintiff's ownership or right to possession continued, and no longer ; and therefore if, pending the action, the plaintiff's title, that is his right to the possession, came to an end, the wrong to him also came to an end. It ceased to

be any wrong or injury to him, and became a wrong to the new owner, if that did not happen to be the defendant himself. The plaintiff from that time ceased to have any interest in the possession, and was no longer in any way concerned about it. On the other hand the new owner could at once bring an action for the wrong to him, which, although it concerned the same land, was not the same cause of action. The defendant had kept the former plaintiff from getting the possession of his land. He is now doing the same thing to the new plaintiff, which is a new and separate cause of action, which accrued to him at the moment he obtained his title. Under section 51 the first plaintiff could proceed and get his costs, but could not get possession, and the new owner could bring his action and recover the possession.

Judgment.

MACLENNAN,
J.A.

I think it clear that the word "expired" in section 31, includes the case of a conveyance, as well as the case of a cesser of a life estate, or the expiration of a lease. One of the meanings of "expire" is, to come to an end, to cease; and no reason can be suggested why the cesser of the plaintiff's title by conveyance should stand on a different footing from a cesser by any other means.

I think that, although it may be thought that the word "expire" is not the best word to express cesser of title by conveyance it is sufficient for that purpose, and ought to be so construed in order to give the fullest and most beneficial effect to the Act of the Legislature, and to prevent the injustice of a recovery of possession by one whose right to it had ceased and no longer existed. See *Cole on Ejectment*, pp. 290, 352; 2 *Roscoe N. P.* 16th ed., p. 998; *Doe dem. Morgan v. Bluck*, 3 *Camp.* 447; *Gibbins v. Buckland*, 1 *H. & C.* 736; *Buckland v. Gibbins*, 32 *L. J. Ch.* 391; *Knight v. Clarke*, 15 *Q. B. D.* 294.

Therefore by the deed of October, 1867, the plaintiff's right to possession ceased. That right passed to Irvine, and he, and he alone, was the person who from that time could turn the defendant out of possession, and could obtain the aid of the Court for that purpose. That Irvine

Judgment. could at once have brought a new ejectment, cannot, as it
MACLENNAN, seems to me, be disputed for a moment ; and if so, it would
J.A. be a strange state of the law if two actions could go on at
the same time, and if the possession could be recovered by
two different persons.

It is said that Lemesurier held the land as a trustee ; and that his conveyance to Irvine was upon the same trusts on which he himself held the land ; and that there was no change in the real, that is, the equitable ownership of the land. I do not see how that can make any difference. Ejectment was an action at law, and the equitable rights of parties were not and could not be regarded in any way, nor could the rights of the defendants be affected by them.

From the date of the conveyance to the 8th January, 1871, nothing appears to have been done in the action. On that day Lemesurier died. All he could have recovered by going on with his action in his lifetime, would have been his costs, and his judgment that he was at the commencement of his action entitled would have enabled him to bring another action for mesne profits. At his death, however, it is difficult to see that the action did not abate absolutely, on the principle of *actio personalis moritur cum personâ*. The Ejectment Act provides for revivor in case of the death of a sole plaintiff. In that case his legal representative might, by leave of the Court, enter a suggestion of the death, and go on with the action.

In this case there was no legal representative, for the plaintiff had no title to pass to any one, either by devise or descent ; and as stated by Mr. Cole, p. 352, the legal representative is the person legally entitled to the property as heir, executor, administrator, devisee, or otherwise.

In my judgment the action came to an end altogether at the plaintiff's death. There could be no revivor merely for the purpose of proceeding to a trial for costs, and the subsequent negotiations of the solicitors could not give life and vitality to an action which was dead.

I am, therefore, of opinion that the order of revivor was improperly made, and that it was rightly set aside by the learned Chief Justice, and that the appeal should be dismissed.

Judgment.

MACLENNAN,
J. A.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Appeal dismissed with costs.

IN RE VIRGO AND THE CITY OF TORONTO.

Municipal Corporations—By-law—Hawkers and Peddlers—“Licensing, regulating, and Governing”—Restriction as to Streets—R. S. O. ch. 184, sec. 495 (3).

Under R. S. O. ch. 184. sec. 495 (3), which provides that the council of any city may pass by-laws “for licensing, regulating, and governing” hawkers and peddlers, a city council may, acting in good faith, pass a by-law to prevent hawkers and peddlers from prosecuting their trade on certain streets.

Judgment of GALT, C.J., affirmed.

THIS was an appeal from the judgment of GALT, C. J., dismissing a motion to quash sub-section 2a of section 12, and sub-section 2a of section 43, of by-law No. 2453 as amended by by-law No. 2934.

Statement.

Section 12 of by-law No. 2453, provided that a license should be taken out by :—

“(2) All hawkers, petty chapmen, or other persons carrying on petty trades, or who go from place to place, or to other men’s houses, on foot or with any animal bearing or drawing any goods, wares, or merchandise for sale, or in or with any boat, vessel or other craft, or otherwise carry goods, wares, or merchandise for sale ; except that no such license shall be required for hawking, peddling, or selling from any vehicle or other conveyance, goods, wares, or merchandise to any retail dealer, or for hawking or peddling goods, wares, or merchandise, the growth, produce, or

Statement. manufacture of this province, not being liquors within the meaning of the law relating to taverns or tavern licenses, if the same are being hawked or peddled by the manufacturer or producer of such goods, wares, or merchandise, or by his *bond fide* servants or employees, having written authority in that behalf, and such servant and employee shall produce and exhibit his written authority when required so to do by any municipal or peace officer; nor from any peddler of fish, farm, and garden produce, fruit, and coal oil, or other small articles that can be carried in the hand or in a small basket; nor from any tinker, cooper, glazier, harness mender, or any person usually trading or mending kettles, tubs, household goods or umbrellas, or going about and carrying with him proper materials for such mending."

Section 43 was as follows:—

"43. There shall be levied and collected from the applicant for every license granted for any business or object in this by-law specified as requiring a license, a license fee as follows:—

(2) "For a license to anyone following the calling of a hawker, peddler, or petty chapman, (1) with a two horse vehicle, \$40; (2) with a one horse vehicle, \$30; (3) on a street corner or other place where permission is given therefor other than in a house or shop, \$15; (4) on foot with a handbarrow or waggon pushed or drawn, \$7.50; (5) with a creel or large basket-crate, \$2.50. And the general inspector of licenses shall furnish each such licensee with a suitable badge, to be worn by said licensee in a conspicuous place while plying his trade."

The first amending section complained of provided that no hawker or peddler referred to in section 12, sub-section 2, of the original by-law, whether a licensee or not, should prosecute his trade on certain named streets of the city; and the second amending section complained of provided that the annual fee for a fish hawker or peddler should be with a horse, mule, or other animal and vehicle, \$10; and on foot, \$2.50.

The motion was argued on the 6th of September, 1892, before GALT, C. J., who on the 17th of September, 1892, dismissed it with costs. Statement.

The applicant appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 3rd of February, 1893.

DuVernet, for the appellant. The power given to the municipal council by R. S. O. ch. 184, sec. 495, sub-sec. 3, is to issue licenses to hawkers and others to exercise their calling within the city as a whole, and no provision is made for the issuing of partial licenses. The first part of the amending by-law is unreasonable in that licensees are excluded from carrying on their calling on the main thoroughfares and in the busiest and most active localities of the city. The power given to municipalities by the sub-section is only a power to "license, regulate and govern" and the restrictions of section 286 must also be borne in mind. A power to limit, prohibit or restrict is always given in express terms, *e.g.*, "For preventing or regulating the carrying on of manufactories or trades dangerous in causing or promoting fire:" sec. 496, sub-sec. 14. The first part of the by-law is also unreasonable and unfair, not only to licensees, but to residents on the prohibited streets, as the latter are unable to purchase household supplies at their doors; and to merchants on unprohibited streets as merchants on other streets have an unfair advantage over them; and it unfairly benefits shopkeepers carrying on business on prohibited streets. Sub-section 2a of section 43 is repugnant to the closing proviso of sub-section 2 of section 12, in exacting a license from fish peddlers; the last mentioned sub-section which exempts fish peddlers from license fees never having been repealed. That sub-section sets up an unjust and unauthorized discrimination in favour of peddlers of fish who are given an unfair advantage. See *Bannan v. City of Toronto*, 22 O. R. 274; *Regina v. Pipe*, 1 O. R. 43;

Argument. *Regina v. Johnston*, 38 U. C. R. 549; *McKnight v. City of Toronto*, 3 O. R. 284; *Yates v. Milwaukee*, 10 Wall. 497.

H. M. Mowat for the respondents. The Legislature by the Municipal Act, R. S. O., ch. 184, sec. 495, sub-sec. 3, intended to give cities full power over traders of the sort dealt with, and when conferring the power used the words "licensing, regulating and governing." No stronger words can be suggested. The word "prevent" is not necessary, for total prevention is not attempted and even if the word "regulate" alone had been used there would have been power to confine the operations of peddlers to certain portions of the city: *Re Kiely*, 13 O. R. 451. Sub-section 2a of section 43 is not repugnant to section 12 (2), because the latter relates only to fish that can be carried "in the hand or in a small basket," while sub-section 2a relates to the more important business of peddling fish from vehicles drawn by animals, or from a pushcart. There is no discrimination in this by-law between different classes, therefore the cases cited by the appellant to support that contention do not apply.

Du Vernet, in reply.

May 9th, 1893. OSLER, J. A. :—

I have examined the several sections and sub-sections of the Municipal Act conferring police powers upon the corporation, and am of opinion that the words of section 495, sub-section 3, are wide enough to support this by-law which restrains the persons mentioned in that sub-section, and in clause two of section 12 of by-law 2453 from prosecuting their calling or trade in certain specified streets and parts of streets in the city. Whatever difficulty there is in the case is caused by the loose inaccurate and promiscuous way in which the facultative words have been used in the various sections and sub-sections of the Act, thus affording ground for the argument that the power to restrain within territorial limits was not conferred by the particular enactment in question. But words conferring the power to

license, regulate and govern, are very large, and while no doubt falling short of a power to prohibit absolutely, cannot, it appears to me, have their full force if we deny that under them the city may impose the rule or restraint within the city which this by-law imposes, and may guide and restrict the persons affected by it as to where they shall not carry on their trade therein. "To govern," is "to regulate by authority, to keep within the limits prescribed by law, to control, to restrain." I am not much in favour of invoking the aid of a dictionary in the construction of a statute; but it must be conceded that the powers which this by-law professes to execute are powers of regulation and government within the natural meaning of the words used in the Act, which surely have relation to the control of time, place and manner.

I have not succeeded in finding any case upon the precise point in our own Courts, but there is a dictum of the late Chief Justice Sir Adam Wilson, whose familiarity with municipal law is well known, in *Re Kiely*, 13 O. R. 451, 456, where the question arose on a by-law passed in pursuance of a supposed power to "regulate and license" the owners of livery stables.

The learned Chief Justice says: "The power to regulate confers upon the commissioners the power to declare in what locality or localities such stables shall be allowed."

In *Barbier v. Connolly*, 113 U. S. 27, it was held that a municipal ordinance prohibiting from washing and ironing in public laundries or washrooms within defined territorial limits from ten o'clock at night to six in the morning, was a purely police regulation within the competency of a municipality possessed of the ordinary powers belonging to such bodies. This case was followed in *Soon Hing v. Crowley*, 113 U. S. 703, where the Court refer in addition to the constitution of California, from which State the appeal came, which declares that "any city, county, etc., may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

In *Rex v. Harrison*, 3 Burr. 1322, a custom for the over-

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

seeing, correcting and governing of the several persons using arts, trades, mysteries, etc., etc., within the city and liberties of London, was held to support a by-law that to entitle a person to carry on the trade of a butcher in London, he must be free of the Butchers Company.

In *Bosworth v. Hearne*, 2 Str. 1085, where the city of London had by customary law the regulation of carts, a by-law that no drayman or brewer's servant should be abroad in the streets with his dray or cart after one o'clock in the afternoon, between Michaelmas and Lady Day, and from thence after eleven o'clock in the forenoon, was held good. These cases are referred to in the recent remarkable and interesting case of *The Maxim Nordenfeldt Guns and Ammunition Co. v. Nordenfeldt*, 9 Times L. R. 150,* as illustrations of those in which rules regulating trade have been distinguished from those made in restraint of it, although in *Bosworth Hearne*, 2 Str. 1085, a general restriction was imposed limited only as to time, which, if the by-law had been regarded as one in restraint of trade, and not in regulation of it, would have been void. *A fortiori* then it appears to me that a by-law passed under a statutory power to pass by-laws to regulate and govern, and which restricts the persons subjected to it from carrying on their business within certain limits of space only, and with no restriction as to time, is unobjectionable, applying to such a by-law the principle on which contracts even in restraint of trade are held good. There is no suggestion that this by-law was not passed in good faith. It is not on its face unreasonable, and there is no evidence before us that it is so in fact.

I see nothing in clause 2a, added to section 43 of by-law 2453 by by-law 2934, which is inconsistent with section 12 (2) of the former by-law. The license fee imposed by the amending clause is imposed on a different description of fish hawk or peddler from the one mentioned in section 12 (2) who is exempted by that Act.

On the whole I am of opinion that the judgment of Sir Thomas Galt, C. J., should be affirmed.

* Now reported, [1893] 1 Ch. 630.

MACLENNAN, J. A. :—

Judgment.

MACLENNAN,
J.A.

I have come to the conclusion that this judgment ought to be affirmed.

The Act authorizes a by-law for "licensing, regulating, and governing hawkers," etc., and what this by-law does is to restrict them from carrying on their business in certain named streets, or parts of streets, within the city. The question is whether this is a lawful regulation. The argument is that it is not, but that instead of regulating it prohibits the business in question; and it cannot be denied but that within the defined limits it does prohibit. There seems to be no case in our own courts which decides the point, nor do any of the numerous cases to which we have been referred afford much assistance in its determination. In *Re Kiely*, 13 O. R. 451, the late Chief Justice Wilson expressed the opinion with reference to the power given to police commissioners, "to regulate and license the owners of livery stables;" that "the power to regulate confers upon the commissioners the power to declare in what locality or localities such stables shall be allowed." But this was said *arguendo*, and it may be said to be only a *dictum*. It is, however, valuable as the opinion of a Judge who had a very great knowledge of municipal law.

Every regulation of a business necessarily interferes with it, and with those who are engaged in it, more or less. It is a restraint upon it—imposes a rule or rules to which the parties must conform, and by which they must be governed. The business is not to be prohibited, it is to be permitted, but it is to be carried on under prescribed regulations.

In exercising the power given by the statute of course the municipal authority must act *bond fide*, and in the public interest, and may not prohibit by a pretence of regulating. But so acting it seems to me the power of regulation must include reasonable restrictions as to time, place, and manner. The law favours trade. The general rule is that all restraints of trade, if nothing more appear, are bad. In *Mitchel v. Reynolds*, 1 P. Wms. 181, where that

Judgment. rule is laid down in an elaborate judgment of Lord Mac-
MACLENNAN, clesfield, restraints of trade by agreement or bond, and
J.A. restraints by by-law are treated as depending on the same principle; and as to restraints by by-law, he says (p. 184): "All by-laws made to cramp trade in general are void;" but "by-laws made to restrain trade, in order to the better government and regulation of it, are good, in some cases, viz, if they are for the benefit of the place, and to avoid public inconveniences, nuisances, etc." And in the reports of Willes, C. J., at p. 388, is the case of *Gunmakers of the City of London v. Fell*, in which that learned Judge says: "But to this general rule (that is, that all restraints of trade are bad), there are some exceptions; as first that if the restraint be only particular in respect to the time or place, and there be a good consideration given to the person restrained, a contract or agreement upon such consideration so restraining a particular person may be good and valid in law, notwithstanding the general rule; and this was the very case of *Mitchel v. Reynolds*, where such a bond was holden to be good. So likewise if the restraint appear to be of a manifest benefit to the public, such a restraint by a by-law or otherwise may be good. For it is to be considered rather as a regulation than a restraint, and it is for the advantage and not the detriment of trade that proper regulations should be made in it." The by-laws which were therein question were made by the Gunmakers company and related to their own trade. The authority for making them was under a charter, which empowered them to make ordinances concerning the trade and mystery of gunmaking, and the well ordering and government thereof, within the city of London and within four miles thereof. The decision is in favour of the legality of restraint as to time and place. Here the power of regulation is given to the municipality. It is given for the benefit of the general public. Therefore if the public good requires it, I think the business in question may be restrained as to time and place. It is prohibited on a number of streets, but the rest of the city and the rest of the province are open.

It is not suggested that the by-law was passed for any other reason than the public good ; and if that is so, I think it is a good regulation, and that it was within the power of the council to pass.

Judgment.
MAOLNNAN,
J.A.

I think, too, the by-law can be supported on this point by another section, viz., 503 (3) for preventing or regulating the sale by retail in the public streets of any meat, vegetables, fruit, etc.

It was also argued that the by-law was void because it affected persons who had taken out licenses, and also persons who were exempt from license by the express provisions of the Act. I think there is nothing in that objection, for the municipality has power both to license and to regulate, and not merely to do either the one or the other; and the provision relied upon merely exempts the persons described therein from license, but not from regulation. It follows that the city may regulate both persons licensed and persons exempt from license.

It was also contended that sub-section 2a of section 43 is repugnant to the closing proviso of section 2 of section 12, in exacting a license from fish peddlers, and that the same sub-section discriminates unlawfully in favour of peddlers of fish. I think these objections also fail. If a by-law is inconsistent with or repugnant to an earlier by-law it is not therefore void. So far as there is any such inconsistency or repugnancy the first by-law may perhaps be to that extent repealed or modified, but the new by-law being the last expression of the mind of the enacting power must prevail, if in itself *intra vires*. And, as to discrimination, there can be no such question raised as between peddlers of fish and peddlers of other commodities, because there is and can be no competition between them.

I am therefore of opinion that all the objections which have been urged before us to the judgment fail, and that it should be affirmed.

HAGARTY, C. J. O., and ECKTON, J. A., *concurrent*.

Appeal dismissed with costs.

ERDMAN V. TOWN OF WALKERTON.

Evidence—Action for Negligence—Subsequent action under Lord Campbell's Act—Identity of Issues—Examination de bene esse.

Although the widow's right of action under Lord Campbell's Act is in several respects distinct from the husband's right of action in his lifetime arising out of the same circumstances, still the issues are so far connected and identical that the examination *de bene esse* of the husband in an action brought by him in his lifetime, but which abated at his death, is admissible evidence in the widow's action against the same defendants, the husband having been cross-examined by them. Where it is desired to use depositions at a trial, the order that should be made is that the depositions be transferred to the clerk of assize or local registrar, the trial Judge being left free to decide as to their admissibility.

Judgment of the Queen's Bench Division, 22 O. R. 693, affirmed.

Statement.

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 22 O. R. 693.

The action was brought on the 6th of June, 1892, under Lord Campbell's Act, by the widow and executrix of one John B. Erdman, to recover damages sustained by reason of his death, which took place on the 1st of April, 1892, the result, as alleged, of a fall into a ditch negligently left by the defendants in a dangerous condition. At the time of the death of John B. Erdman an action was pending in which he was plaintiff and the town of Walkerton were defendants, in which he claimed damages for injuries sustained by him in the accident which ultimately resulted in his death and gave rise to the present plaintiff's claim. In that action on the *ex parte* application of the plaintiff an order for his examination *de bene esse* was made, and he was examined under it, the defendants' solicitor objecting to the regularity of the proceedings and taking no part in the examination. An application was then made on notice for an order allowing this examination to be used in any action that might be brought in case of the plaintiff's death, and in the alternative for leave to examine him further for such purpose, and without prejudice to the application the Master in Chambers made an interim order for the plaintiff's examination which was had on the 23rd of March, 1892, the defendants' solicitor attending and

cross-examining. On the 7th of October, 1892, an order Statement. was made in the present action by the Master in Chambers providing that this examination might be given in evidence at the trial "saving all just exceptions." In each action upon the application of the defendants one Heughan, a contractor, had been added as a third party, but he was not notified of the examination *de bene esse* or of the application for the order of the 7th of October, 1892. On the 8th of October, 1892, notice of appeal from the order of the Master in Chambers was given by the defendants and, pending this appeal, on the 10th and 11th of October, 1892, the action was tried at Walkerton before STREET, J., when the depositions were tendered in evidence and were rejected and the action was dismissed. On the 26th of October, 1892, the appeal from the order of the Master in Chambers was heard in Chambers by STREET, J., and was allowed, but at the November Sittings the Queen's Bench Divisional Court set aside both the judgment of STREET, J., at the trial, and the order made by him in Chambers, and the order of the Master in Chambers was restored and a new trial directed.

The defendants appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 23rd of March, 1893.

Aylesworth, Q.C., for the appellants. The only question involved is the admissibility of the depositions taken in the former action, for it is admitted that if these depositions cannot be given in evidence in this action the judgment at the trial was right. It is submitted that the depositions were properly rejected. This action is not a suit between the same parties. The plaintiff in this action, though she may be executrix of the plaintiff in the former action, is not, in bringing this action, claiming under him, or representing him, or asserting any right of action he ever had. The cause of action in this suit is purely statutory. The right to sue is conferred by the statute, and might have been given to the sheriff

Argument. of the county quite as well as to the executor. The plaintiff in maintaining this action does so merely as a piece of the machinery provided by the statute to enable the family of the deceased to recover the damages they have suffered from his death. The action is for the benefit of the persons named in the statute, and not in any respect for that of the estate of the deceased: *Leggott v. Great Northern R. W. Co.*, 1 Q. B. D. 599. It must be conceded that these depositions are not admissible in evidence as against Heughan, and it must follow that they cannot be admitted at all, for he is bound by the result of the litigation as between the plaintiff and the town, and it would be the greatest injustice that evidence should be admitted upon which damages might be recovered against the town if the same evidence could not be used by either the plaintiff or the town to cast the damages upon the person who may be the only real wrongdoer. The cause of action in this suit is not the same, or substantially the same, as in the former suit, but the two causes of action are essentially different and distinct: *Blake v. Midland R. W. Co.*, 18 Q. B. 93, at p. 110; *Pym v. Great Northern R. W. Co.*, 2 B. & S. 759, 4 B. & S. 396, at p. 406; *The Vera Cruz*, 10 App. Cas. 59, at pp. 67, 70 and 71; *White v. Parker*, 16 S. C. R. 699; *Brunsdon v. Humphrey*, 14 Q. B. D. 141; *Potter v. Metropolitan R. W. Co.*, 30 L. T. N. S. 765, 32 L. T. N. S. 36; *Bradshaw v. Lancashire & Yorkshire R. W. Co.*, L. R. 10 C. P. 189. Proper notice of the examination was not given, and at any rate the question of admissibility was for the trial judge and should not have been settled by a Chamber order.

Hoyles, Q. C., for Heughan, the third party, relied on the arguments for the appellants and referred also to *Zimmer v. Grand Trunk R. W. Co.*, 19 A. R. 693.

Shaw, Q. C., for the respondent. To justify the admission of the depositions it is not essential that either the parties or the form of action should be precisely the same: it is sufficient if they are substantially the same. Here they are substantially the same: Greenleaf on Evidence, 15th ed., sec. 164; Taylor on Evidence, 8th ed., sec. 464; *Switzer v. Boul-*

Argument

ton, 2 Gr. 693; *Carrington v. Cornock*, 2 Sim. 567; *Llanover v. Homfray*, 19 Ch. D. 224, at pp. 229, 230; *Lawrence v. Maule*, 4 Drew. 472; *Moggridge v. Hall*, 13 Ch. D. 380; *Indianapolis, etc., R. W. Co. v. Stout*, 53 Ind. 143. Although the plaintiff does not represent the estate of the late John B. Erdman as executrix she does represent him in this action by virtue of R. S. O. ch. 135, sec. 2. In one view a new right of action is given by the statute, but in conferring the new right it confines it to the cause of action which existed in favour of the injured person previous to his death. The party injured might settle for the injury in his lifetime. If he did, his widow or his executrix could not after his death sue under the statute, because it is so far the same cause of action: *Read v. Great Eastern R. W. Co.*, L. R. 3 Q. B. 555. It would be different if the executrix had sued for the injuries causing death and had recovered, and had then sued for damages to the estate, as representing the estate of the deceased. The cause of action in each case would be distinct; one for the personal injury, the other for the estate, and such a case was *Leggott v. Great Northern R. W. Co.*, 1 Q. B. D. 599, which instead of being adverse to the respondent's contention, illustrates it. The position of the plaintiff in this action is further illustrated by reference to *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357, where (at p. 363) Field, J., refers approvingly to *Read v. Great Eastern R. W. Co.*, L. R. 3 Q. B. 555, and says it is a clear decision that Lord Campbell's Act did not give any new cause of action, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had, if he had survived, and (at p. 365, Cave, J., gives a similar though somewhat stronger opinion. Two cases: *White v. Parker*, 16 S. C. R. 699; and *The Vera Cruz*, 10 App. Cas. 59, appear at first sight to support the appellants' contention, but in neither case did the question at issue here require to be decided. In the first case there is merely a note of the decision and the dictum mentioned was not necessary to that decision. The action in the second case was an action *in rem* against a vessel, and the decision

Argument. merely was that Lord Campbell's Act did not apply. It was not necessary that Heughan should have been notified of the examination of the plaintiff. The plaintiff had not sued him; he was not a defendant in the action, only a third party, being able, if he chose, to defend with the defendants. If notice to him was required it was the duty of the defendants to notify him as he was brought in by them.
Aylesworth, Q.C., in reply.

May 9th, 1893. HAGARTY, C. J. O. :—

The point requiring proof in both actions may be said to be the same, viz., the negligence of the corporation causing the injury to Erdman and his subsequent death. Without this proof of negligence and consequent actionable injury no recovery could be had in either action.

The statements made by the deceased would be equally evidence against him in either suit. They would, of course, have been evidence in the first suit had he survived, and the corporation could there use the statements in his evidence if they chose, so far as they bore in their favour.

This meets an objection taken in the books, viz, that nobody can take benefit by such evidence who had not been prejudiced by it had it gone contrary: Gilbert's Law of Evidence, p. 28; Buller's N. P., 7th ed., pp. 229, 232; 2 Phillipps' Law of Evidence, 10th ed., p. 8. Erle, C. J., says: "The evidence is not admissible against the defendant unless it would also be admissible against the plaintiff." *Morgan v. Nicholl*, L. R. 2 C. P. 117.

The subject is very fully discussed in Taylor on Evidence, 10th ed., sec. 464 *et seq.*, where the general rule is thus stated: "When a witness has given his testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given, will, if the witness himself cannot be called, be admitted in any subsequent suit between the same parties, or those claiming under them, provided it relate to the same subject, or substantially involve the same material questions."

In section 467 it is said the admissibility of the evidence seems to turn rather on the right to cross-examine than upon the precise identity either of the parties or of the points in issue, and several authorities are cited showing how this rule is applied.

Section 469 qualifies this rule by stating that the right to cross-examine has this effect only when the opponent is the same in both actions.

In the (15th) last edition of Greenleaf on Evidence, vol. 1, sec. 164, there is the same statement as to the right to use the evidence, namely, that it "turns rather on the right to cross-examine than upon the precise nominal identity of the parties," but it is there confined apparently to cases where the second trial is between parties who represent those in the previous suit "by privity in blood, in law, or in estate."

Vaughan Williams, J., says, in *Hulin v. Powell*, 3 C. & K. 323: "The admissibility of depositions in cases of this kind does not depend on mere technical grounds; and one question is, had the lessor of the plaintiff an opportunity of examining the witness." A passage is there cited from Starkie's Law of Evidence, 3rd ed., vol. 1, p. 280: "It is not essential that either the parties or the form of action should be precisely the same, if they are substantially the same."

I do not find this passage in the 4th edition, the only one I have been able to refer to. I suppose that the difficulty in admitting the deposition in the present case is because the plaintiff is sufficiently interested in the issue with the plaintiff in the former suit whether the estate was in the former plaintiff or in privity with him in law or in estate."

WILKES, J., says in *Hempden v. Hutton*, 1 C. & K. 117: "By persons jointly or severally claiming jointly or severally." "By persons jointly or severally claiming jointly or severally."

I find no express authority in the English or in the American reports nor law nor even that directly bearing on the point. There is one American case, *Johnson v. Johnson*, 2 N.

Judgment.

HAGARTY,
C.J.C.

Judgment. *Co. v. Stout*, 53 Ind. 143, where the depositions of the original plaintiff at the trial of an action at his own suit against the railway company, in which he obtained a verdict, but died before judgment and the suit abated and then the widow his administratrix sued, were admitted, and the Supreme Court held this proper; that the causes of action were the same, citing the passage from *Greenleaf* already quoted, and that the statute made the plaintiff the representative of the deceased, and that it was clearly competent to prove the evidence at the former trial. The question is not very fully discussed.

HAGARTY,
C.J.O.

There are cases such as *City of London v. Perkins*, 3 Bro. P. C. 602, where depositions in former suits against other defendants to prove the same custom of claiming tolls on goods were admitted, apparently on the principle that the litigation was between the city and the public, and in the case of commissioners and the Lord of the Manor evidence in a former suit by commissioners were allowed in a long subsequent suit by other commissioners, it being held that there was sufficient privity of estate and the witnesses being dead: *Llanover v. Homfray*, 19 Ch. D. 224. See also *Carrington v. Cornock*, 2 Sim. 567; 1 Daniell's Chancery Practice, 6th ed., p. 595. See also *Lady Dartmouth v. Roberts*, 16 East 334, and the old case of *Terwit v. Gresham*, 1 Ch. Cas. 73.

In *Kinnersley v. Orpe*, 2 Doug. 517, the plaintiff, owner of a fishery, sued the defendant William Orpe for killing his fish. The defendant justified as servant of Cotton who had the right. A previous action had been brought against Thomas Orpe who was also a servant justifying under Cotton.

The record of verdict and judgment in the first suit was admitted in the second suit, the Court holding it admissible, both the Orpes having acted by authority of Cotton who was the real defendant.

In the case before us, we find the plaintiff pursuing the statutable remedy for the death of her husband caused by the defendants' negligence. She cannot recover unless he could

have recovered for the injury done to him if not followed by death. Our Act, R. S. O. ch. 135, says, that where death is caused by such wrongful act as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, etc. Section 5 declares that only one such action shall lie on the same subject matter of complaint.

The Imperial Act, 9 & 10 Vic. ch. 93, says: "Not more than one action for or in respect of the same subject matter of complaint."

There appears to be no doubt but that in all matters of procedure the actions are distinct and independent. We had to notice this in the late case of *Zimmer v. Grand Trunk R. W. Co.*, 19 A. R. 693, where we held that the six months' limit under the Railway Acts cannot apply to an action in respect of the death, for which twelve months are allowed from the death. We held that the action under Lord Campbell's Act was a wholly new remedy, etc. Of this latter proposition there can of course be no doubt.

Blake v. Midland R. W. Co., 18 Q. B. 93, and *S'ym v. Great Northern R. W. Co.*, 4 B. & S. 396, are usually cited as early authorities thereon.

Read v. Great Eastern R. W. Co., L. R. 2 Q. B. 555, is cited to shew that compensation to the party injured runs the action by the widow. After hearing the two mentioned cases and others, Lord Esher says the act does not give any new right of action. "The intention of the enactment was that the death of the person injured should not free the wrongdoer from an action and in those cases where the person injured could maintain an action the personal representatives might sue."

Lush, J., speaks in the same effect and says, "It provides a different mode of obtaining the damages, but that does not give a second cause of action."

In *Griffiths v. Earl of Dudley*, 12 A. R. 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Judgment.
HAGANBY,
C.J.O.

Judgment.

HAGARTY,
C.J.O.

Treating this as a new remedy created by statute, must we cling to the technical distinction of privity in blood, law or estate, when we regard the true relation of the present to the previous plaintiff and find the privity in its widest sense to be substantial? I think we are safe in accepting the substantial relation as falling within the general rule.

The cases are numerous where great latitude was allowed when the subject matter was the same although the parties were different. When tithes were claimed by rector or vicar the evidence in suits between former rector or vicar against other occupants was admitted.

The case of copyholders has been already noticed, and also of the proving of rights to levy rates and tolls as in *City of London v. Perkins*, 3 Bro. P. C. 602; and also of legatees allowed the benefit of the evidence in suits by other legatees to prove assets and of the suits of or against different ter-tenants as in *Terwit v. Gresham*, 1 Ch. Cas. 73.

We have here the facts that the whole foundation of the actions against the defendants is the same, viz., their negligence; that there was cross-examination; that the evidence is equally available for the defendants as for the plaintiff, and I think on the whole it ought to be received.

I think the objections urged against the mode of taking the evidence cannot prevail. There was full opportunity and facility for cross-examination and the defendants' counsel did examine. Although there was evidence that the deceased was then in a hopeless state as to recovery, there is no suggestion either from the medical attendant or the defendants' solicitor that he was unfit or unable to be cross-examined.

BURTON, J. A. :—

It is impossible, I think, in view of the decisions that have been given from time to time upon Lord Campbell's Act, not always, I think, quite consistent with each other, to say that the Divisional Court were wrong in holding that the depositions of the deceased were admissible.

Before the passage of that Act no action was maintainable in England if death ensued from the injury ; but it was different in Scotland where an action was always maintainable in case of death by misconduct generally, and the damages were not measured by pecuniary loss only, but Scotland was expressly excepted from the Act.

Judgment.

BURTON,
J. A.

There was, I think, at first a general impression on the passage of Lord Campbell's Act, and before a judicial interpretation had been placed upon it, that it was intended to assimilate the law of England to that of Scotland, and if that had been held to be the effect of the statute, there would have been no doubt that evidence given in the first suit would have been receivable in the second ; but it was manifest on a close reading of the Act, and was so held very shortly after its passage, that it did not keep alive or transfer to the representative of the deceased the right of action, but gave to a named person a totally new right of action for the benefit of persons who had themselves sustained injury by the death of the deceased. It was not the injury to the deceased which gave the right of action, it was the actual injury to the persons on whose behalf the action was brought resulting from the death of the deceased.

There seemed to be a good deal of difficulty at first in placing a construction upon the statute, a complaint being made that it did not very clearly define on what principle the action it gives was to be maintainable, nor on what principle the damages were to be assessed and as expressed by one learned Judge, " the only way to ascertain what it did was to shew what it did not mean."

It was, however, held in the earlier decisions that it was a distinctly new cause of action for injuries done to the family by the death.

Nevertheless it was subsequently held in *Read v. Great Eastern R. W. Co.*, L. R. 3 Q. B. 555, that the cause of action was so far the same that if the person injured by the wrongful act or neglect had accepted satisfaction in his lifetime an action under Lord Campbell's Act was not afterwards maintainable.

Judgment.

BURTON,
J.A.

The decision in that case, if I may be allowed to say so of a jurist of the eminence of Lord Blackburn, savours to my mind more of legislation than interpretation. He says, taking the plea to be true, that the party injured could not maintain an action in respect thereof as he had already received satisfaction, in other words he read the statute as if it had said "if the deceased could at the time of his death have maintained an action," but that is not what the statute says. It says, "whenever the death of a person is caused by a wrongful act and the act is such as would, if death had not ensued, have entitled the party injured to maintain an action, then the person causing the injury shall be liable to an action for damages notwithstanding the death of the party injured."

So that we have one series of decisions holding that the widow cannot recover damages for the husband's suffering, and yet if the person causing the injury satisfies the deceased for that suffering the widow who has suffered heavy pecuniary loss by the death is barred of her remedy.

I do not recognize the force of Mr. Justice Lush's reasoning in the same case, "that the intention of the statute is not to make the wrongdoer pay damages twice for the same wrongful act." Is not this a fallacy? The deceased recovered damages for the personal suffering he had endured; the wife sought to recover them for the injury to herself, a pecuniary loss consequent upon her husband's death. But I refer to the case because it does decide that the Act does not give any new right of action "but provides a new principle as to the assessment of damages."

That case is cited with approval in *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357, and is there said to be a clear decision that Lord Campbell's Act did not give any new cause of action, but only substituted the right of the representative to sue in place of the right which the deceased himself would have had if he had survived.

Mr. Justice Cave merely says we are bound by that decision.

It is difficult to reconcile these cases. My own view

has always been that on the construction given to the Act shortly after its passage an entirely new cause of action was given to the family if they had suffered injury, and if the injury to the deceased was of a kind which would have subjected the wrongdoer to an action for damages at his suit, but in each case the foundation of the action was the negligence of the defendant. I think that in view of these decisions, and the fact that our statute makes the plaintiff the proper party to sue for damages resulting from the death, I cannot say that the Divisional Court were wrong in holding that the cause of action and the parties are substantially the same.

Judgment.
Buxton,
J.A.

To doubt, it has been said, is to affirm, and it is on this ground, rather than from a full concurrence in it, that I join in affirming the judgment of the Court appealed from.

The plaintiff is suing only the town of Walkerton, and I agree with Mr. Justice Falconbridge that we have nothing to do with the third party brought in by the defendants. How this evidence may affect him is not before us for consideration.

Those depositions only should be received which were taken at the examination of which the defendants had proper notice and an opportunity of cross-examination.

OSLER, J. A. :—

The principal question is whether the secondary evidence offered of the facts connected with the accident which is supposed to have caused the death of the plaintiff's husband was under the circumstances admissible within the general rule of law thus stated in the Digest of the Law of Evidence, Art. 32.

“Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding * * when the witness is dead—provided (1) the person against whom the evidence is to be given had the right and opportunity to cross-examine the

Judgment.

OSLER,
J.A.

declarant when he was examined as a witness; (2) that the questions in issue were substantially the same in the first as in the second proceeding, and (3) that the proceeding, if civil, was between the same parties or their representatives in interest."

The difficulty the plaintiff has to contend with lies in the application of the last condition. The evidence tendered consists of the depositions of her husband taken *de bene esse* in the action brought by him against the principal defendants, an action which abated in consequence of his death from the injuries he had sued for.

Llanover v. Homfray, 19 Ch. D. 224, shews that the mere fact that the evidence was taken *de bene esse*, and never actually used on the trial of the former case, is no objection to its reception in the subsequent one.

The present action, brought under R. S. O. ch. 135, [R. S. O. (1877) ch. 128; C. S. C. ch. 78] taken from the Imperial Act commonly known as Lord Campbell's Act, is one wholly unknown to our common law. It is not brought on behalf of the estate of the deceased person, but for the benefit of persons standing in certain degrees of relationship to him, who have been injuriously affected by his death. This Act for the first time gave such persons a legal remedy for their loss against the persons who had wrongfully caused the death of the person in whose life they were pecuniarily interested.

The plaintiff in this instance happens to be the executrix of the deceased, but she is a mere instrument on behalf of those persons in bringing the action, and they are expressly empowered to sue in their own name if there is no personal representative, or should there be one, if no such action is brought by him within a limited time after the death.

"Lord Campbell's Act," says Lord Selborne in *The Vera Cruz*, 10 App. Cas. 59, at p. 67, "gives a new cause of action clearly, and does not merely remove the operation of the maxim '*actio personalis moritur cum persona*,' because the action is given in substance not to the person repre-

senting in point of estate the dead man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor."

And see *per* Lord Blackburn in the same case, p. 70; and in the Court of Appeal, 9 P. D. 99, at p. 100, *per* Brett, M. R. The right to maintain the action, is, however, except in the case of death in a duel, most reasonably made subject to the condition that the deceased himself should, at the time of his death, have been entitled to maintain an action and recover damages for the injury; so at all events the section has been construed, and therefore it may perhaps be said that the case just cited, and *Blake v. Midland R. W. Co.* 18 Q. B. 93, and *Pym v. Great Northern R. W. Co.* 4 B. & S. 396, are not absolutely inconsistent in principle with the decisions in *Read v. Great Eastern R. W. Co.*, 9 B. & S. 714, L. R. 3 Q. B. 355; *Senior v. Ward*, 1 E. & E. 385; *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357; and similar cases, where the question was, whether at the time of the death of the person injured this condition existed, or as to the nature of the damages recoverable. The language of the Court in those cases must, of course, be interpreted with reference to the question before them, and where it is said that the Act did not give a new cause of action, but only substituted the right of the representative to sue in place of the right which the deceased himself would have had if he had survived, it is to be borne in mind that the question before the Court was whether the deceased under the circumstances would have had any right of action at the time of his death, as, if he had not, neither had the plaintiffs. In Mr. Beven's recent book on Negligence, p. 182 *et seq.*, an attempt is made to reconcile the various decisions, and the views of our Supreme Court are expressed in *Canadian Pacific R. W. Co. v. Robinson*, 19 S. C. R. 292, which I cite notwithstanding its reversal by the Judicial Committee. [1892] A. C. 451, since the sole ground of that reversal was that the Court was in error in assuming that the article of the Quebec Code, under which

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

the action was brought, was to be construed as a mere re-enactment of the Consolidated Statutes of Canada ch. 78, instead of as a new and independent law. The Privy Council in short there followed the principle laid down in *Bank of England v. Vagliano*, [1891] A. C. 107, in holding that an appeal to earlier law and decisions for the purpose of interpreting the provisions of a statutory code can only be justified on some special ground such as the doubtful import or previously acquired technical meaning of the language used therein.

The action is therefore seen to be one of a most anomalous character, dependent upon the deceased's having had a right to sue in his lifetime, and yet an action to enforce a new right given to his family where they have sustained a pecuniary loss by his death. They sue for their own loss and damage, not for his, and yet cannot sue for anything unless he could himself, if death had not ensued, have maintained an action and recovered damages for the injury which has caused it. They are not his representatives in the usual sense of the term as succeeding to any right of action which he himself had. They are enforcing an original right or cause of action of their own which nevertheless they would not have had if he had no cause of action, or had released it, or had recovered judgment or satisfaction in his lifetime. Their immediate cause of action seems to be the death by reason of the defendant's negligence and their own pecuniary loss resulting from it, and the measure of their own damages is entirely different. Their action being altogether *sui generis* it is difficult to find a parallel in any of the numerous cases in which the question of the admission of evidence taken in a former action has been considered. The question must be dealt with on principle, and if the case comes within the principle the evidence ought to be admitted even though some anomalies may appear, and though the plaintiffs are not in respect of their action strictly the representatives of the deceased as privies in blood, privies in law, or privies in estate.

It is laid down that the admissibility of the evidence seems to turn rather upon the right to cross-examine than upon the identity of either the parties or the points in issue in the two proceedings: Taylor's Law of Evidence, 8th ed., section 464; and also that the statement of the witness can only be adduced against the party who has cross-examined in the event of the opponent of such party being substantially the same in both actions; in other words, the proceeding in which it is sought to adduce the evidence must be between the same parties or their representatives in interest "because the right to use evidence, other than admissions, being co-extensive with the liability to be bound thereby, the adversary in the second suit has no power to offer evidence in his own favour, which, had it been tendered against him, would have been clearly inadmissible:" section 469.

It is true that in the very nature of this case two tests of the admissibility of the evidence are wanting, viz., that a judgment in an action brought by the deceased, supposing he had prosecuted it to judgment, could not be evidence in the present action, and that the deceased if living could not be a witness in this. That is merely to say that in these two contingencies this action could never have had an existence. But the former action was upon the same subject matter as the present as regards that which is at foundation of both of them, viz., the negligence of the defendants, and the defendants who were parties to it had the right to object to the competency of the deceased as a witness and to cross-examine him, and the plaintiff there had the same right as to any witness introduced by the defendants for the purpose of shewing that he had no right to maintain it. We have therefore in this action two of the elements or conditions of the admissibility of the evidence. As to the third I feel the difficulty caused by the divergent views which have been expressed of the nature of the action, and of its substantial identity with or difference from the action which the deceased himself had against the defendants, and I am not free from doubt in pronouncing

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

in favour of the plaintiffs. I am satisfied that they cannot be said to be the representatives of the deceased in the same sense in which question has heretofore arisen, *e.g.*, actions of ejectment, actions in which the same class of persons are interested, and actions respecting customary rights. Yet in their origin the rights of the plaintiffs are very closely interwoven with those of deceased. Their title, though a statutory one, grows out of and is dependent upon his, and the evidence which would have been destructive of or would have supported his right would equally be destructive of or would sustain their own. In this way they may be said to claim under or to be in privity with him and this seems to introduce the third element or condition on which the admissibility of the evidence depends involving that of reciprocity or mutuality which would make it admissible at the instance of either party against the other so that, for example, evidence taken *de bene esse* on behalf of the defendants in the former action would be admissible against the new plaintiffs under similar circumstances. If there be a doubt we ought, I consider, to lean rather in favour of the admission of the evidence than of its rejection, when we can see that the fact to be proved was the same in both actions; that the parties in both had the same interest in the reception or rejection of evidence to prove it; that upon the existence of the fact depended primarily the right of the plaintiff in either case to recover; and that upon the existence of the plaintiff's right to have recovered in the former action depends that of the now plaintiff to recover in this.

On the whole I consider that the case for the admission of the evidence comes within the principle, and therefore that the appeal on that point should be dismissed. I refer to *Canadian Pacific R. W. Co. v. Robinson*, 19 S. C. R., at pp. 292, 303, 305, *per* Strong, J., and at p. 316 *et seq.*, *per* Taschereau, J.

I think, however, that the order of Mr. Justice Street reversing the order of the Master in Chambers should not have been interfered with. That order may have been

harmless, as the officer had of course no power to order what should or should not be admitted in evidence, or be evidence, and the case is not within Consolidated Rule 564 as to proof of facts by affidavit. The only order which under our present practice it can be necessary or proper to make in such circumstances as appeared is an order that the depositions be transmitted from the office here to the clerk of assize or local registrar for the purpose of being used at the trial, just as any affidavit or other document on the files of the Court is ordered to be so transmitted. The trial Judge will then determine upon proper proof of the facts whether the depositions are admissible. The order of Mr. Justice Street must therefore be restored, but I do not think that should make any difference in the disposition of the costs of the appeal.

Judgment.

ORDER,
J.A.

As to the defendant Heughan, his case must be dealt with by the trial Judge hereafter, and is, in my opinion, quite unaffected by the dismissal of the appeal. The issue between him and his co-defendants is raised by them upon the record, and must be tried and disposed of upon evidence legally admissible against him.

MACLENNAN, J. A. :—

I agree.

Appeal dismissed with costs.

LAWSON V. MCGEOCH ET AL.

Assignments and Preferences—Bankruptcy and Insolvency—Evidence—Presumption—Onus of proof—R. S. O. ch. 124, sec. 2, sub-secs. 2 (a) and 2 (b)—54 Vic. ch. 20 (O.)

Held, per HAGARTY, C.J.O. (hesitante), and BURTON, J.A.—The presumption spoken of in sub-sections 2 (a) and 2 (b) of section 2 of R. S. O. ch. 124, "An Act respecting Assignments and Preferences by Insolvent Persons," as amended by 54 Vic. ch. 20 (O.), is a rebuttable one, the onus of proof being shifted in cases within the sub-sections.

Per MACLENNAN, J.A.—The presumption is limited to cases of pressure, and as to that is irrebuttable.

Per OSLER, J.A.—The presumption is general and is irrebuttable; but the security in question is supportable under the previous promise.

Cole v. Porteous, 19 A. R. 111, distinguished.

Judgment of the Common Pleas Division, 22 O. R. 474, affirmed.

Statement.

THIS was an appeal by the plaintiff from the judgment of the Common Pleas Division, reported 22 O. R. 474.

The action was brought by the plaintiff, who was a judgment creditor of the defendant McGeoch, on behalf of himself and all other creditors of the defendant McGeoch, to set aside a chattel mortgage made on the 7th of January, 1892, by McGeoch to the defendant Clements, securing \$800 and interest, covering the whole of his goods and chattels, farm stock and implements, and growing crops.

The action was commenced on the 22nd of January, 1892, and was tried on the 14th of March, 1892, at Milton, before FALCONBRIDGE, J.

It was shewn that the chattel mortgage had been given to secure moneys advanced by Clements to McGeoch at different times, the last advance having been made on the 21st of September, 1891, and it was proved that the advances were made on condition that a chattel mortgage should be given, the fulfilment of the promise having been delayed from time to time for various reasons, chiefly, as McGeoch swore, because of his having been so busy in connection with farm work. At the time the advances were made the action between Lawson and McGeoch was pending, and in that action judgment was entered on the 25th September, 1891, referring the issues to a referee who made

his report on the 7th January, 1892, finding McGeoch indebted to the plaintiff in a large amount, for which judgment was entered. Apart from this judgment McGeoch was indebted to only a very small amount, but taking this judgment and costs into consideration he was admittedly insolvent. McGeoch swore that up to the time the judgment was recovered he fully expected to succeed in his defence, and that his solicitor had advised him to that effect, and it was not shewn that Clements had any reason to suspect that he was in insolvent circumstances, or that there was any intent to give or obtain a preference. Statement.

FALCONBRIDGE, J., held that, insolvency having been proved, the case was governed by *Cole v. Porteous*, 19 A. R. 111, and gave judgment for the plaintiff with costs, but on appeal this judgment was reversed by the Divisional Court.

The plaintiff appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 9th of March, 1893.

Kappele, for the appellant. It is admitted that the mortgagor was insolvent when he made the mortgage in question, and that being so, the question is conclusively settled in favour of the plaintiff by sub-section 2 (a) of R. S. O. ch. 124, as amended by 54 Vic. ch. 20, proceedings to set aside the security having been taken within sixty days from the time when it was given. The Court below have erred in holding that the presumption spoken of in this sub-section is a rebuttable one. The true interpretation of that section is that given in *Cole v. Porteous*, 19 A. R. 111. Even under the sections of the old Insolvent Acts, which were not so strongly expressed, presumptions of this kind have been held irrebuttable: *Campbell v. Barrie*, 31 U. C. R. 279; *Davidson v. Ross*, 24 Gr. 22. An attempt has been made to support the mortgage on the ground that it was given in pursuance of an antecedent promise. In the first place, however, no definite promise

Argument. has been proved, and even if the promise had been proved, that is not sufficient to save the transaction which must be dealt with as of the date at which it was consummated by the giving of the security.

Skilton, for the respondents. It is clearly shewn that the mortgage was taken by Clements in good faith to secure advances made to McGeoch on the faith of the promise by the latter to give a chattel mortgage, and although only given on the 6th of January, 1892, it must be treated as if given on the 21st September, 1891, when the final advance was made and the definite specific promise to give security was made: *McRoberts v. Steinoff*, 11 O. R. 369; *Allan v. Clarkson*, 17 Gr. 570; *Clarkson v. Sterling*, 15 A. R. 234. This being so, the case does not come within the amending section at all. Even if, however, that section is applicable, the mortgage can be supported. That section only has the effect of shifting the onus of proof and the presumption spoken of is rebuttable. The very use of the term "presumption," shows that it is so, for *ex vi termini* "presumption" means something that is to be taken as *prima facie* established but is subject to be disproved. See Best on Presumptions, p. 22. Where the Legislature intended to make it impossible to controvert an inference arising from certain facts they have said so. See for example R. S. O. ch. 58, sec. 2.

Kappele, in reply.

May 9th, 1893. HAGARTY, C. J. O. :—

A large portion of the difficulty in this case arises from the wording of the statute, 54 Vic. ch. 20 (O.), to the effect that the transaction which has the effect of giving a preference, if impeached within sixty days, shall be "presumed" to have been made with the intent, etc., and to be an unjust preference whether made voluntarily or under pressure.

It is a most unfortunately selected word. Except in our repealed Insolvent Acts I do not find it used in the

statutes. If here, as in the Jamaica case of *Nunes v. Carter*, L. R. 1 P. C. 342, the word used had been "deemed," there would be no difficulty.

Judgment.
HAGARTY,
C.J.O.

The simple and intelligible course would have been to avoid all preferential dealings within the prescribed time.

In 1 Austin's Jurisprudence, p. 507, it is said: "It is absurd to style conclusive inferences presumptions. For a presumption, *ex vi termini*, is an inference or a conclusion which may be disproved. Till proof to the contrary be got, the inference may hold. On proof to the contrary, it can hold no longer." See also Best on Evidence, 7th ed., p. 255, sec. 300; Best on Presumptions, p. 29; "*Stabit presumptio donec probetur in contrarium*:" Broom's Legal Maxims, p. 903.

The question was raised in this Court in *Davidson v. Ross*, 24 Gr. 22, and the Judges were equally divided.

It is discussed in *Campbell v. Barrie*, 31 U. C. R. 279, by Wilson, C. J., and by my learned brother Osler in *Cole v. Porteous*, 19 A. R. 111.

I have little doubt but that the Legislature may have intended to avoid absolutely all these transactions within the limited time, but the language used raises a most arguable doubt. I feel great hesitation on this branch of the case.

But I think the judgment of the Common Pleas may be supported on the ground of the security being given under the original contract to give the security, and on the principle discussed and affirmed in the judgment of the Court in *Clarkson v. Sterling*, 15 A. R. 224. The findings in the Court below as to the good faith of the whole transaction support the application of the equitable principle of regarding the dealing of the parties as of the date of the agreement under the agreement to give the security.

BURTON, J. A. :—

In this case we are called upon to pass a transaction upon sub-sections 2^a and 2^b of section 2 of 34 Vic. ch. 20 (O.); in other words to say whether the provisions

Judgment.
BURTON,
J.A.

referred to in those sub-sections is a rebuttable or irrebuttable presumption.

A similar question arose upon the construction of the former Insolvent Act, in *Davidson v. Ross*, 24 Gr. 22, and in *Campbell v. Barrie*, 31 U. C. R. 279.

In the latter of these cases the late Chief Justice Wilson in an elaborate judgment, after referring to a statement in Austin's Jurisprudence that the word "presume" is an absurd and inappropriate term when used to express an inference or conclusion in law, when the word "deemed" would appear to be the more appropriate expression, proceeded to consider the proper meaning of the word as used in the 86th and 89th sections, the former dealing with gratuitous contracts or conveyances made without consideration, made by an insolvent within three months next preceding the assignment, and with contracts made by a debtor unable to meet his engagements with a person knowing such inability; and held that in that section the presumption should be *presumptio juris et de jure*, for why, as he remarks, should a conveyance without consideration be supported against creditors, or a contract made with a person who knew he had no right to make it to the prejudice of his creditors, be permitted to stand? He held therefore that the word should be read "deemed."

When dealing however, with section 89 he held that the word should receive a more qualified interpretation, and that the transaction was not necessarily defeated or avoided, but that the onus of proof only was shifted, and that the party impeaching it was entitled to succeed on proving that it occurred within the prescribed period, unless the debtor established that it was not done in contemplation of insolvency.

In the subsequent case of *Davidson v. Ross*, 24 Gr. 22, this Court were equally divided, the late Chief Justice Draper and Mr. Justice Patterson holding that the presumption under that section was irrebuttable, and Burton, and Moss, JJ. A., that it was rebuttable. The Legislature adopted the latter view by an amendment made by 40

Vic. ch. 41, sec. 29 (D.), adding the words "*prima facie*" to the word "presumed" in this section, leaving the construction placed by Chief Justice Wilson on this word in the other section untouched. This is, of course, by no means conclusive as to the interpretation to be placed on the word as used in the enactment we are considering.

It may be contended on the one hand that the omission of the words "*prima facie*" shews an intention that the presumption shall be irrebuttable. On the other hand we should be prepared to find that if intended to be conclusive the Legislature, after the difference which, previous to 40 Vic. ch. 41, existed, would have used some other word such as is used in the late English Bankrupt Act, as "deemed" or a similar expression, and that when they used the word "presumed" they meant it to be read as they had interpreted it in 40 Vic. ch. 41 (D.).

I think, however, we must seek for the proper interpretation of the word as used in this statute from a consideration of the provisions of R. S. O. ch. 124, and the decisions upon it which led to this amendment.

The former law made all transfers, etc., void if made by an insolvent with intent to delay creditors or to give one or more of them a preference over his other creditors, *or which had such effect*.

The meaning of these latter words led to much difference of opinion, some Judges holding that in applying the Act they had only to ascertain whether the person who made the transfer was at the time insolvent, and if its effect was to defeat or delay creditors or to give one of them a preference, the intent became immaterial.

The Supreme Court, however, finally held that the intent to give a preference was still necessary, and that the proper meaning to be placed on the expression was that the words should be considered as applying to a case in which that had been done indirectly, which if it had been done directly would have been a preference within the statute, and that even though the creditor had notice of the debtor's insolvency, if the transfer was the result of

Judgment.

BURTON,
J.A.

Judgment.

BURTON,
J.A.

pressure it would not be void as a preference forbidden by the statute; and that Court also held that the words as to the effect had no reference to a transfer made with intent to defeat or delay creditors.

The result of the Supreme Court decision was that the intent was still material, and they point out that it might be very unjust to invalidate a transaction unless the debtor knew that he was insolvent, and the transfer was made with the intent on his part to defeat creditors or to give one or more of them an unjust preference.

In consequence presumably of this decision, the Ontario Legislature by 54 Vic. ch. 20, recognizing its justice, restored the law as it stood before the introduction of the words "or which has such effect," so that in all cases except those occurring within sixty days it is still necessary to shew the insolvency, the knowledge of it, and the intent; but they go on to provide that if the transaction has the effect of giving a preference it shall, if it be attacked within sixty days, or if the debtor makes an assignment within a similar period, be presumed to have been made with the intent aforesaid, and to be an unjust preference within the meaning of the statute, whether the same be made voluntarily or under pressure.

It is clear that in such cases the Legislature intended to do away with the doctrine of pressure, so that notwithstanding pressure the intent will still be presumed if the transaction is attacked within sixty days, if there is nothing else to rebut it. But I think we are bound to give the same meaning to the word "presumed" as the Legislature has recognized in 40 Vic. ch. 41 (D.), that it is still open to the defendant to shew that the transaction is valid, although the onus of doing so is shifted.

The defendant has satisfied the Court below that the mortgage was given in pursuance of an antecedent agreement more than sixty days before the transaction was attacked, and when, it is sworn, the mortgagee had no notice of the insolvency of the debtor. The dates of the finding of the referee and the execution of the mortgage

have a somewhat suspicious appearance, but there is evidence to warrant the conclusion arrived at, and no reason that I can see to doubt the *bond fides* of the transaction. I think we ought to dismiss the appeal.

Judgment.

BURTON,
J.A.

OSLER, J. A. :—

I agree in affirming the judgment on the ground on which I understand it to be put by the Court below, viz., that the transaction impeached comes within the saving of section 3, sub-section 1, of the Assignments and Preferences Act, R. S. O. ch. 124 ; and I certainly never intended to say, nor do I think I have said, in the case of *Cole v. Porteous*, 19 A. R. 111, that the recent Act of 1891, 54 Vic. ch. 20, sec. 1 (O.), would have the effect of avoiding a security coming within the section referred to, based upon a valid antecedent contract to give it. All I said about that was to point out that there was in that case no such antecedent agreement.

As to the nature of the presumption raised by the Act of 54 Vic. ch. 20 (O.), I retain the opinion that when the circumstances concur, in which the Act declares it shall be made, the true construction of the whole section, read in the light of the decisions and of the previous legislation, requires that it shall be a conclusive or irrebuttable presumption.

I quite agree that the word "presumed" is an unhappy one, but it has here been used in such a connection that it still appears to me that the Legislature has shewn its inevitable intention to employ it in the strongest sense. If the case can arise, and I am far from saying that it cannot, where the instrument attacked has not been made voluntarily or under pressure, it may be that no such presumption is to be made at all ; that the Act does not reach it ; but those two cases are, in my humble opinion, covered by it. If not, I can but regret that the Legislature seems to have again proved its inability to give intelligible expressions to its intention. It is most remarkable that after all

Judgment.

OSLER,
J. A.

the contests which have raged about the phrase "unjust preference," it should again occur in an Act, the object of which surely was to abolish all preferences by an insolvent, and that the draftsman of such an Act would appear not to have been familiar with the decision of the Supreme Court in *Molson's Bank v. Halter*, 18 S. C. R. 88.

MACLENNAN, J. A. :—

On the 10th of December, 1890, in the case of the *Molson's Bank v. Halter*, 18 S. C. R. 88, the Supreme Court of Canada, affirming a judgment of this Court, put a construction upon section 2 of R. S. O. ch. 124, the Act respecting Assignments and Preferences, and decided that the intent to give a preference was still negatived by proof of pressure, even though the effect of the transaction was that one creditor was paid, and another or others were not. At p. 95, Strong, J., says: "A mere demand is sufficient pressure by a creditor to take away from a conveyance, transfer, or mortgage, the character of an unjust preference;" and, "pressure by the creditor in the case of a common debt divests a transaction of any fraudulent colour." He also held that the words of the section, "or has such effect," meant "preferences which might be the consequence of indirect and circuitous forms which might be given to transfers of property made through persons interposed between the debtor and creditor."

Mr. Justice Gwynne, at p. 102, expressed himself in the same way as to the effect of pressure, and concludes his statement by saying: "To constitute a preference it must have been given by the insolvent of his own mere motion, and as a favour or bounty proceeding voluntarily from himself."

Mr. Justice Gwynne also says with reference to the words "or has such effect:" "If the consideration given was good and valuable, and given *bona fide*, the deed could not be said to have the effect of defeating or delaying the

grantor's creditors, nor could the grantor be said to have executed the deed with the intent that it should have an effect which, in point of law, it could not, under the circumstances, be said to have."

Judgment.
MAULENNAN,
J.A.

At the next session of the Legislature, on the 4th of May, 1891, the section which had thus undergone discussion was repealed, and a new section was substituted therefor.

This was done by the Act 54 Vic. ch. 20, sec. 1, which is divided into two sub-sections, under the latter of which and a subordinate section thereto (a), the question which arises in this appeal has to be considered. The sub-section says that every conveyance of goods by an insolvent to a creditor with intent to give such creditor an unjust preference over other creditors, shall as against such creditors be void.

The effect of this enactment is to make void all fraudulent preferences, properly so called, and as defined by Lord Cairns in *Butcher v. Stead*, L. R. 7 H. L. 839, and by the learned Justices of the Supreme Court in the *Halter Case*; that is, conveyances which are the voluntary spontaneous acts of the debtor, with the exception of those mentioned in the 3rd section of the Act. The Legislature, however, went on by the subordinate section (a) to declare that if the transfer, that is the conveyance mentioned in sub-section 2, has the effect of giving a preference, it shall, in any action brought to impeach it within sixty days thereafter, be presumed to have been made with intent to prefer and to be an unjust preference within the meaning of sub-section 2, whether the same be made voluntarily or under pressure.

By this addition to sub-section (2), the Legislature has dealt with cases which are not strictly cases of preference, although the term is still employed unfortunately as I venture to think, and they are put on the same footing as cases of preference. These are cases where the effect as regards other creditors is the same as in cases of preference, namely where disproportion in payment or satisfaction is

Judgment. the result, where one creditor gets an advantage either in
MAULENNAN, point of security for or satisfaction of his debt over others.
J.A. Where that is the effect or result, then if the transaction is attacked within sixty days, it is presumed to be void, even though it may not have been the voluntary and spontaneous act of the debtor, and although it may have been obtained by pressure.

But it has been contended that the presumption is absolute and conclusive, not only as against pressure but as against every thing else. I think, however, that contention cannot prevail. That effect would have been produced by simply saying that the transaction should be void, instead of saying that it should be presumed, etc. If the Legislature had meant that, I think it would have said so, or at all events the clause would have stopped at the word "hereof." The remaining words would not have been added. They are added, as I think, to indicate that the presumption may not be met by proving pressure. That defence is not to be open. That defence is expressly excluded. If others were meant to be excluded why were they not mentioned also? I think the one is mentioned and no others, because that result alone and no others was meant to be excluded—*expressio unius est exclusio alterius*. The intention of the Legislature was, in that class of cases, to cast the burden of proof on the defendant who had thereby gained an advantage, and to a limited extent to do away with the doctrine of pressure. If the clause had stopped at "hereof," it would still have been a question whether the presumption was conclusive. It would have been the same question as was raised in *Campbell v. Barrie*, 31 U. C. R. 279, and *Davidson v. Ross*, 24 Gr. 22, which was found so difficult of solution. I think, however, that the additional words used here distinguish this case from those, and that they make the presumption absolute and conclusive as against this defence alone. For this reason I am led, with great respect, to a somewhat different conclusion from that reached on this point by my learned brother Osler in

Cole v. Porteous, 19 A. R. 111. I think the judgment in that case was right, because that was a case in which the defence rested on pressure alone; and I agree that as against pressure the presumption is absolute. Judgment.
MACLENNAN,
J.A.

The present action having been brought within sixty days of the making of the mortgage the defence of pressure is *prima facie* excluded. It was, however, proved that part of the transaction, namely, the advance of the mortgage money, was more than sixty days before action. But apart from that circumstance it is still open to the defendant to shew, upon other grounds than pressure, that it was not made with intent to defraud or to prefer. I think the evidence shews clearly that the debtor's intent in making the mortgage was not to defraud or prefer the defendant or any other creditor, but to fulfil the promise and agreement he had made in consideration of which he had received a further advance from the defendant. It is said that the agreement was too vague and uncertain to be attended to, as it is not shewn that any particular goods were mentioned, which were to be mortgaged. I am not pressed with this objection. The debtor was a farmer, and the mortgage was to be a chattel mortgage. I think that means a mortgage of the debtor's chattels; and that the defendant could have selected a sufficient quantity of the debtor's goods and have required a mortgage upon them. Therefore I think the mortgage was neither the spontaneous act of the debtor, nor was it procured by mere pressure, and that it is valid.

The appeal should be dismissed.

Appeal dismissed with costs.

BEAVER V. GRAND TRUNK RAILWAY COMPANY OF
CANADA.

Railways—Ticket—Refusal to pay Fare—51 Vic. ch. 29, sec. 248 (D.).

A passenger who has paid his fare, and has lost his ticket, cannot be ejected from the train upon his failure to produce his ticket for inspection by the conductor, there being upon the ticket no condition requiring its production, and no contract for its production having been entered into. That is not a refusal to pay his fare under 51 Vic. ch. 29, sec. 248 (D.).

Judgment of the Queen's Bench Division, 22 O. R. 667, affirmed, OSLER, J. A., dissenting.

Statement. THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 22 O. R. 667.

The action was brought to recover damages from the defendants for having put the plaintiff off a train. The plaintiff lived at Caledonia, in the county of Haldimand, where he purchased on the 28th of September, 1892, a ticket from the defendants entitling him to travel over their line of railway from Caledonia to Detroit and back. He went to Detroit, and on the evening of the 28th of September got on the train at Windsor, intending to return home. Shortly after he got on the train, the conductor asked him for his ticket. He said that he had one in his pocket, and after looking for it said that he could not then find it, and the conductor told him that he would come again for it. After a short time the conductor came back and again asked the plaintiff for the ticket, and was again told that he could not find it. The conductor then told him that he must get off at the next station unless he could produce it. Upon his failure for the third time to produce it the conductor ordered him to get off at the next station, and when the station was reached he had to leave the train; the conductor first asking him to pay his fare, which he refused to do. The ticket was afterwards found by the plaintiff and was produced at the trial. It contained no condition whatever as to its production, but simply stated that it

was good for one continuous trip until a certain day from Detroit to the station stamped on the back, and on the back was stamped the word "Caledonia." Statement.

The action was tried at Cayuga, on the 1st of November, 1892, before ROSE, J., who, at the close of the plaintiff's case gave judgment for the defendants with costs: but the Divisional Court set aside this judgment and granted a new trial.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 24th of March, 1893.

Osler, Q. C., for the appellants. The conductor was not bound to take the plaintiff's statement that he had a ticket or had purchased a ticket. He was entitled to the production of the ticket as an evidence of the plaintiff's right to travel on the train, and in the absence of this evidence he was entitled to treat the plaintiff as a passenger without a ticket, and, the demand for payment of fare not having been complied with, was entitled to eject him for refusal to pay fare under section 248 of the Railway Act, 51 Vic. ch. 29 (D.). The case of *Butler v. Manchester, etc., R. W. Co.*, 21 Q. B. D. 207, has been relied on in the Court below, but that case does not apply, for there is no section in the English Acts corresponding with our section 248 and our own cases of *Duke v. Great Western R. W. Co.*, 14 U. C. R. 369, and *Fulton v. Grand Trunk R. W. Co.*, 17 U. C. R. 428, are in point and should be followed. Section 247 strengthens the view of the appellants.

DuVernet, for the respondent. Section 248 gives no right to put a passenger off the train when the fare has actually been paid. The relationship between the passenger and the company is founded on contract, and there can be no right to eject for failure to produce the ticket unless there has been an agreement entered into that such failure shall lead to such a consequence. In *Duke v. Great Western R. W. Co.*, 14 U. C. R. 369, the regulations as to

Argument. the production of tickets had been brought to the plaintiff's knowledge, but here there is no evidence whatever of these regulations, much less of any knowledge on the plaintiff's part of such regulations. It cannot be said that there was any refusal to pay fare when the fare has actually been paid. The ticket is merely a receipt for the payment. See Article, 32 Journal of Jurisprudence, p. 479, "Eviction of Railway Passengers"; *Burlington, etc., R. W. Co. v. Rose*, 1 Am. & Eng. R. W. Cas. 253; *Downs v. New York, etc., R. W. Co.*, 36 Conn. 287. *Fulton v. Grand Trunk R. W. Co.*, 17 U. C. R. 428, does not apply, for there the passenger had not bought a ticket at all. *Butler v. Manchester, etc., R. W. Co.*, 21 Q. B. D. 207, cannot be distinguished.

Osler, Q.C., in reply.

May 9th, 1893. HAGARTY, C. J. O.:—

I am unable to arrive at the opinion that the judgment appealed from, as delivered by my learned brother Street, is wrong. I am fully sensible of the very great practical inconvenience that may result from this judgment, and also of the additional facilities it may give for attempted imposition. I still think that the plaintiff was unlawfully ejected from the train because he could not produce his ticket, although he had in fact paid the fare to the company. The ticket delivered to him when paying his fare had no conditions stated thereon, and no reference to any condition that he must produce it when demanded by the conductor.

The contract of carriage was complete by payment on his part and acceptance thereof by defendants. The ticket may be regarded as the receipt for the cost of the journey and as evidence of the bargain. In *Henderson v. Stevenson*, L. R. 2 Sc. Ap. 470, the ticket is spoken of as a mere receipt for the money.

But the contract seems to be an absolute bargain to carry from point A to point B, made directly between the plain-

tiff and the defendants, and in the absence of any special conditions qualifying its legal effect, cannot, as it seems to me, be interfered with by the company's servant, the conductor, by insisting on the nonproduction of the ticket as a legal justification of refusing to carry and removal from the train. He was allowed to take his seat in the train, and in the course of the transit we are asked to hold that the contract of carriage is at an end by his inability to produce the ticket.

I cannot hold that "refusing to pay his fare" [51 Vic. ch. 39, sec. 248 (D.)] is to be read as "refusing to produce his ticket." Nor can I see how section 247 can alter the contract as already stated. It directs the company's servants to wear distinctive badges to indicate their office: "He shall not, without such badge, be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office, or to interfere with any passenger or his baggage or property." That tickets are universally used and issued, and are in fact the only practical means of enabling conductors to ascertain that the fare has been paid or as to the distance each passenger is entitled to travel, is matter notorious.

The issue, sale and use of such tickets is fully recognized in our statute law as *e.g.*, in 45 Vic. ch. 41 (D.), regulating the sale and transfer of tickets by duly appointed agents and providing for the redemption of unused tickets, etc., and the application to conductors for the privilege of stopping over, etc. Section 251 also provides for the conductor refunding a passenger's fare if a check for baggage has been refused.

All these matters point to the action of conductors and the existence of tickets as of well known practice. But I still fail to see how the completed contract of carriage and payment of fare can, without express notice to the accepted passenger, be put an end to by nonproduction of the ticket. Large powers are given to the company to make by-laws regulating the travel. These on approval of the Governor-in-Council will be binding.

Judgment.

HAGARTY,
C.J.O.

Judgment.

HAGARTY,
C.J.O.

They can then make special contracts providing for the production of tickets as qualifying the contract of carriage and may print this condition on the ticket. Such a by-law appears to have been pleaded in the case of *Duke v. Great Western R. W. Co.*, 14 U. C. R. 369, so far back as 1857.

I feel strongly the formidable inconvenience urged on the defendants' part by making them responsible in a case like this. But I think they can do much to minimise this result, first by the exercise of their statutable powers, in effect introducing qualifications into what I consider in this case to be an absolute contract. At many large stations on this continent and in Europe precautions are taken by requiring the production of the ticket on entering the platforms from which the train is to start, sometimes also on entering the railway carriage.

It is not a very common occurrence that the ticket is not producible and when the fare has really been paid and the ticket is lost by accident or possibly stolen from the passenger, it seems hard on him that he must pay again on peril of ejection.

The case of *Butler v. Manchester, etc., R. W. Co.*, 21 Q. B. D. 207, does not in its facts govern this case, but the nature of the contract of carriage is fully discussed.

Lord Esher says: "No court has a right to imply any term as between parties which was not clearly and obviously within the contemplation of both parties."

There the by-law only provided for making the party declining to shew his ticket liable to pay his fare from the station where the train originally started to the end of the journey, and the statute had no clause authorizing ejection from the train for refusing to pay fare. "Where (said the Master of the Rolls) is there any contract by which he has agreed that if he fails to shew a ticket or to pay the fare mentioned in the regulation, the company may lay hands on him and put him out of the carriage by force?"

Jennings v. Great Northern R. W. Co., L. R. 1 Q. B. 7, may be referred to as shewing how the contract must be

understood. The plaintiff took a first-class ticket for himself and three third-class tickets for his three boys in charge of his horses on the train. The train was divided into two parts—the plaintiff being in the first part. After the departure of the first part the boys in the second part of the train were required to show their tickets, and, being unable to do so as the plaintiff had them, were prevented from proceeding with the horses.

There was the by-law requiring production of tickets, etc., etc. It was held that as, as the jury found, the plaintiff had taken and paid for all the tickets for the horses and the boys in charge the defendants were liable; that the company had entered into a contract not with the boys but with their master, and he was entitled to have them carried; that the by-law was for the protection of the company, and they must keep strictly within its provision; that they had delivered the tickets to the master.

I cite the case as bearing on the point that the actual contract must be regarded. It might be said there that it was the plaintiff's fault in not giving the tickets to the boys to produce when required. There too the practical difficulties and inconveniences would occur, as suggested in the present case, as the conductor would have had no means of knowing that their master in the preceding train had paid for the boys.

The Imperial statute 52 & 53 Vic. ch. 57, sec. 5, makes it penal for a passenger to refuse to produce his ticket on request or pay his fare from the place whence he started or give his name and address, and he may be detained until he can be conveniently brought before a justice of the peace.

No provision is made for expulsion from a train.

Not without reluctance I feel bound to hold that the appeal fails.

BURTON, J. A. :—

I am of opinion that the judgment of the Divisional Court is right.

Judgment.

HAGARTY,
C.J.O.

Judgment.
BURTON,
J.A.

The company are empowered under section 214 of the Act [51 Vic. ch. 29 (D.)] to make by-laws for, *inter alia*, regulating the travelling upon, or the using or working of the railway.

It is not necessary for the purpose of this case to consider whether such a by-law applies to persons travelling in the company's own carriages, which was questioned by the late Chief Justice Cockburn in *Saunders v. South Eastern R. W., Co.*, 5 Q. B. D. 456, although a different view was taken by Mr. Justice Lindley in *Dyson v. London and North-Western R. W. Co.*, 7 Q. B. D. 32, or if so applicable whether a by-law providing that every passenger should shew or deliver up his ticket to any conductor or authorized servant of the company when required to do so, and in default should be liable to be put out of the train, would be a valid or reasonable regulation.

No such by-law or regulation is pleaded or relied on. What the company set up as a justification of their action in this case is a violation of section 248 of the Railway Act [51 Vic. ch. 29 (D.)], and it is clear that that can afford no defence as the plaintiff had paid his fare and was guilty of no violation of that section in refusing to pay it again.

Here there was an absolute contract to carry, without conditions of any kind, and the nonsuit therefore cannot be upheld.

The decision in *Duke v. Great Western R. W. Co.*, 14 U. C. R. 369, does not appear to me to be in conflict with this view, although there are some dicta in that case which might appear at first sight to be so.

That case came twice before the Court, first upon demurrer, and turned more upon the pleading than the actual facts, as they were afterwards proved on the trial. It would appear upon the pleadings rather that the fare was payable to the conductor, and the plaintiffs replied with a special traverse introducing new matter viz., that the plaintiff had paid the fare at the station; but instead of relying upon that as a defence, and concluding with a verification so as to enable the defendants to reply to

the new matter, the reply concluded with an *absque hoc*, which put in issue only that the plaintiff did not refuse to pay the conductor the fare.

Judgment.

BURTON,
J.A.

Subsequently at the trial the defendants set up a regulation which provided that each passenger booking his place and paying his fare would be furnished with a ticket which he was to shew when required by the conductor.

Each passenger not producing the ticket when required would be required to pay the fare to the conductor from the place where he entered the train to the place of destination, and they contended that the plaintiff had notice of these regulations.

There is nothing said in these regulations expressly authorizing the conductor to remove the plaintiff from the car, but it is distinguishable from the present case in that it is admitted that there was not there an absolute contract to carry without condition ; but that there was a condition, to which the plaintiff had assented, to produce the ticket when required or pay the fare.

In the other case of *Fulton v. Grand Trunk R. W. Co.*, 17 U. C. R. 428, the plaintiff never had paid his fare, and refused to pay more than once when applied to.

The appeal should, I think, be dismissed.

MACLENNAN, J. A. :—

I am of opinion that this judgment should be affirmed.

Sections 247 and 248 of the Railway Act [51 Vic. ch. 29 (D.)] imply that a passenger may pay his fare, in the absence of special regulations, either by purchasing a ticket from the ticket agent, or by paying money to the conductor of the train. In this case the plaintiff purchased a return ticket at Caledonia for a journey from that place to Detroit and back. He performed the journey to Detroit, having exhibited his ticket, and having given up one part of it, retaining the part which represented his return journey. On the return journey he entered the train without objection and the journey commenced, and after proceeding some distance

Judgment. his ticket was called for by the conductor, but he did not
MACLENNAN, produce it, alleging that he could not find it. The conduc-
J. A. tor then demanded payment of his fare, which the plaintiff refused to pay, and he was ejected from the train at the next station. The question is whether the conductor had authority to remove him.

Section 247 says that without his badge the conductor shall not be entitled to demand or receive from any passenger any "fare or ticket," and then the following section 248 says that a passenger who refuses to pay his "fare" may be ejected. I find it impossible to hold that the words "pay his fare" are to be enlarged by construction to include the shewing of a ticket in case he has paid his fare by purchasing one in the usual way. I think if the Legislature had meant that it would have said so. Having expressly mentioned both fare and ticket in section 247, the fare alone is mentioned in section 248. I think that shews it was not meant to impose the penalty of ejection in the case of nonproduction of the ticket. The conductor had no right to demand payment of fare. The plaintiff had really paid his fare. His sole fault was in not producing his ticket, a fault for which the Act had imposed no penalty. The Legislature might well think it proper that a man should be put off the train who had not paid his fare, and who refused to pay it, while taking a very different view of what should be done in the case of one who had really paid his fare, but had mislaid or lost his ticket. No doubt the conductor was in a difficult position. He could not tell whether the plaintiff had really bought and paid for a ticket or not, but that is a difficulty that might occur in other cases. The plaintiff had performed half his journey, and had exhibited his ticket; one part of it had been taken up, and he had been allowed without objection to commence his return journey. Suppose the case of a passenger paying his fare for a somewhat long journey to the conductor, and a change of conductors in the course of it, could the new conductor put him off because he had no ticket, and was unwilling to pay a second time? The

company has, by sections 214 and 215 of the Act, large powers of making by-laws, rules, and regulations, and of imposing a penalty for their infraction, and I feel that we cannot strain the language of section 248 so as to make that a serious offence which may have been nothing more than a mere accident or misfortune.

Judgment.
MACLENNAN,
J.A.

I think the appeal should be dismissed.

OSLER, J. A. :—

The importance of this case to railway companies and the travelling public can hardly be exaggerated, involving as it does, if it stands unreversed, and is not corrected by legislation, the practical destruction of the ticket system. I cannot admit that it stands on all fours with that of *Butler v. Manchester, etc., R. W. Co.*, 21 Q. B. D. 207. There the company had made a by-law which, for the purposes of the case, was assumed to be reasonable and valid, which provided that every passenger should shew and deliver up his ticket to any authorized servant of the company when required to do so, and that any passenger travelling without a ticket, or failing or refusing to shew or deliver up his ticket when demanded, should be required to pay his fare from the station from whence the train originally started to the end of his journey. There was no statute, law, rule, regulation, or condition whatever authorizing the company to eject a passenger for refusing to pay his fare. The plaintiff having lost his ticket, failed to produce it when required, and refused to pay the fare as required by the by-law. Whereupon the servants of the company ejected him from the train.

It was held that the contract between the parties did not by implication authorize the defendants to remove the plaintiff from the carriage, and that their only remedy was to sue him for the amount of the fare he had refused to pay. The passenger, it was said, was under no obligation to shew his ticket to the guard; the only consequence of his refusal to do so was that the company might sue

Judgment.

OSLER,
J.A.

him for the full fare if he refused to pay it, but could not eject him from the train. It has been held by the Court below, relying upon the authority of this case, which as a decision of the Court of Appeal we are of course bound to follow where it applies, that a passenger on one of our railways is in the same situation, and that he is under no obligation to produce his ticket where he has paid for one in the absence of any condition in his contract with the company requiring it and in the absence of any regulation relating to it made under the 214th section of the Railway Act [51 Vic. ch. 29 (D.)]. The first question then is whether the principle of that decision is applicable to such a case as that before us. With all submission I think it is not.

There are two sections in the Railway Act which in my opinion make a very considerable difference here in regard to the respective rights and obligations of the company and the passenger. Section 247 enacts that every servant of the company employed on a passenger train shall wear a badge which shall indicate his office, and he shall not without such badge be *entitled to demand or receive from any passenger any fare or ticket*.

And section 248 enacts that any passenger who refuses to pay his fare may by the conductor of the train be put out of the train.

We are bound to have regard to the practice in the railway travelling system of this country of purchasing tickets at the company's offices instead of paying the fare on the train, and that it is entirely optional with an intending passenger to adopt either course. Section 247 recognizes the existence of this practice. I admit that the ticket may be or is evidence of a contract to carry an intending passenger but not of a contract to carry him by the particular train on which he is travelling unless he produces it in order to shew that he is using it for that journey since he may hereafter use it on a similar journey or may have transferred it to some one else who will use it. For what purpose has he purchased it if he is under no obligation to produce it? In *Butler's Case* he was

under no such obligation, because the only alternative of nonproduction was that he had to pay the fare under the by-law of the company, and if he did not do so, might be sued therefor, and the point decided was that there was no law which authorized the company to put him off the train for nonpayment. But here, if the judgment below is sound, the passenger may lose the ticket and another person may get it and travel on it, or he may transfer it in fraud of the company to a nonpaying friend at his side, or may arbitrarily refuse to produce it at all and yet insist upon his right to be carried upon the particular train on which he is travelling without a particle of evidence that he has paid his fare for the journey, and if the conductor refuses to take his word for it and ejects him from the train, may afterwards sue the company if he can produce the ticket or prove its contents and its loss. The company are of course powerless to prove affirmatively that a ticket had not been purchased and are therefore always at the mercy of the traveller.

Judgment.

OSLER,
J.A.

There is in my opinion an express recognition by the Legislature in section 247 of the right of the company's acknowledged servant to demand the production of the ticket in lieu of payment of the fare and of an obligation on the part of the passenger to produce it, if he wishes to be regarded as travelling upon it. A person in his position knows that he will not enter the train and leave it at his good pleasure at any point it may be convenient for him to select as the termination of his journey, "and no questions asked." He knows, on the contrary, that the company have an officer on the train whose duty it is to ascertain from the passengers the point to which they are to be carried on the company's line. He knows that this officer is the person whom the company have placed in charge of the train, and who is to be satisfied of his right to be on that particular train by payment of the fare or the production of the ticket which represents the fare for that journey, and that this officer is armed with power to eject him from the train if he refuses to pay his fare.

Judgment.

OSLER,
J.A.

A ticket is, in my opinion, purchased for the very purpose of proving to the conductor by its production the passenger's right to be travelling on that very train. The conductor is entitled to demand it, and there is a corresponding obligation on the part of the passenger to produce it. If he does not produce it he is not entitled to say that he is then travelling upon it, in other words, that that particular journey is the one for which he has paid his fare; the alternative is that he must pay his fare for that journey to the conductor, failing to do which he refuses to pay his fare within the meaning of the Act, and the statutory power to eject him from the train may be exercised.

It is not too much to say that it is common knowledge that the ticket is purchased for the purpose of putting the passenger in a position to prove to the conductor, who has power to eject for nonpayment of fare, that the fare for that journey on which the passenger chooses to use the ticket has been already received by the company, and for the reasons already given I think the passenger takes it under the implied obligation to produce it for that purpose when demanded, if he does not desire to occupy the position of a person refusing to pay his fare.

Since the argument we have been referred to a recent English Act, 52 & 53 Vic. ch. 57, and its provisions as to production of the ticket. The only value of the reference is to emphasize the broad distinction between our Act and the English Act.

In the reasons against appeal the objection is taken that the defendants did not prove that the conductor wore a badge when the ticket was demanded. Nothing was said of this at the trial, and no doubt if the plaintiff had suggested it, or objected that the defendants' motion for nonsuit was premature, the formal proof could immediately have been supplied.

The point is not noticed in the judgment of the Court below nor taken as one of the grounds on which the new trial was granted and I think we cannot now give any effect to it. There can be no doubt that every one con-

cerned knew perfectly well that the conductor in question, who seems to have been an old servant of the company, wore his usual uniform and badge. I think the appeal should be allowed.

Judgment.

OSLER,
J. A.

Appeal dismissed with costs,
OSLER, J. A., *dissenting.*

IN RE ASSIGNMENTS AND PREFERENCES ACT, SECTION 9.

Constitutional Law—Bankruptcy and Insolvency—Property and Civil Rights—Assignments and Preferences—B. N. A. Act, secs. 91 (21), 92 (13)—R. S. O. ch. 124, sec. 9.

Held, MACLENNAN, J. A., dissenting, and OSLER, J. A., expressing no opinion, that section 9 of R. S. O. ch. 124, "An Act respecting Assignments and Preferences by insolvent persons," is *ultra vires* the Ontario Legislature.

THIS was a case stated for the opinion of the Court under 53 Vic. ch. 13 (O.), the question asked being, "Had the Legislature of Ontario jurisdiction to enact the 9th section of the Revised Statutes of Ontario, ch. 124, and entitled 'An Act respecting Assignments and Preferences by Insolvent Persons?'"

Statement.

The question was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 30th and 31st of January, 1893.

Robinson, Q. C., and W. Nesbitt, for the Minister of Justice. It is difficult, if not impossible, to confine the discussion to section 9 alone, and it is also difficult to add anything to what has already been said on the subject. That section must, it is submitted, be looked upon as part of the general scheme of the Act, and in that broad sense it is clearly a section dealing with the subject of bankruptcy and insolvency, and therefore beyond the jurisdiction of the Legislature of Ontario. The general effect of the

Argument. Assignments Act was considered by this Court in *Clarkson v. Ontario Bank*, 15 A. R. 166, and other cases decided at the same time, and this Court was then equally divided on the question of the validity of the sections then in question; but even those members of the Court who held that the sections then in question were valid, made an express reservation as to section 9, which has several times been pointed to as savouring most strongly of insolvency legislation. See particularly the remarks in *Clarkson v. Ontario Bank*, 15 A. R. 166, at pp. 200 and 216, and the section has been specifically held *ultra vires* by GALT, C. J., in *Union Bank v. Neville*, 21 O. R. 152. It is admitted that the Dominion Parliament has exclusive jurisdiction over "bankruptcy and insolvency," but the difficulty is as to the real meaning of those terms. It is important to keep in view the fact that both terms are used in the Act. The first term is used to define a legal system of procedure for bringing persons within the specific legal status of bankrupt, while insolvency is a term applied to the mere inability to pay debts, and does not denote any specific legal status. Bankruptcy was originally confined to traders, while any person might be an insolvent. The leading distinction between the two views on the subject is, that there is no bankruptcy or insolvency legislation unless there is a power of compulsorily placing a person in that position with provision for restoration to the original status by discharge. But this, it is submitted, is altogether too narrow a view to take. The Act in question is based upon and takes effect only when the condition of insolvency arises. The preamble of the original Act, 48 Vic. ch. 26 (O.), and the very title of the Act show this. The view of those who uphold the jurisdiction of the Ontario Legislature, as ably given expression to by the late Master in Chambers, in *Union Bank v. Neville*, 21 O. R. 152, at pp. 155, 156, rests on the fallacious assumption that the Province has exclusive jurisdiction over property and civil rights. The fallacy consists in forgetting that this provincial jurisdiction over property and civil rights is subject to the higher

powers given to the Dominion Parliament under section 91. Were it not so, the powers given to the Dominion Parliament under section 91, would be nugatory, for it would be almost impossible to legislate on any of the subjects therein mentioned without affecting property and civil rights within the Provinces. This Act presupposes and is based on a condition of insolvency and changes the original legal rights when the condition of insolvency supervenes, and any legislation that affects ordinary legal rights simply because a condition of insolvency has arisen, is necessarily legislation in relation to the subject of insolvency. Section 9 is peculiarly a section that affects the ordinary legal rights of creditors of a person who has become insolvent. The fact that the Dominion Parliament has not seen fit to legislate on the subject, does not confer any right on the Province to enact legislation such as is now in question. In the United States it is different, for there each State is allowed to legislate until Congress sees fit to do so. But it is not possible to hold that if the Dominion Parliament does not exercise the exclusive jurisdiction assigned to it, the Province may infringe on that jurisdiction, however inconvenient the absence of valid legislation may be.

Irving, Q. C., and Moss, Q. C., for the Attorney-General for Ontario. The section in question was passed simply for the purpose of providing for the distribution of assets by an assignee in the same way in which they would be distributed by a sheriff if no assignment were made, and, as is pointed out in *Clarkson v. Moore*, 17 O. R. 372 at p. 597, this section and The Creditors Relief Act, R. S. O. ch. 65, deal merely with procedure. As far back as *Phillips v. Mulholland* 15 O. P. at p. 73 the suggestion was made that a system like the present one was not a substitute in protecting the rights of creditors. The condition of insolvency is not an end in itself, but a condition of procedure under these laws. It is a state from which a man may be solvent and his property may be distributed by a sheriff if an assignment is not made.

Judgment.

HAGARTY,
C.J.O.

Quirt v. The Queen, 19 S. C. R. 510, seem to support the view that legislation of the nature of that now before us, affecting the distribution of insolvent estates, is appropriated by the Federation Act to the Dominion Parliament.

This last case was before us under the name of *Regina v. County of Wellington*, 17 A. R. 421. I adhere to the opinion there expressed by me.

I must answer the question submitted to this Court in the negative.

BURTON, J. A. :—

I can add but little to what I said in *Edgar v. Central Bank*, 15 A. R. 196. The Parliament of Canada having power to pass laws for the good government of the Dominion, were entrusted with the exclusive power of passing laws on the subject of bankruptcy and insolvency; and the question is, whether this section falls within those terms.

Their meaning is, I think, well expressed by Lord Selborne thus: "The words describe in their well known *legal sense*, provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions on which that law is to be brought into operation; the manner in which it is to be brought into operation, and the effect of its operation."

In other words, "bankruptcy" and "insolvency" were well known legal terms, not confined to the state of things in England or the Provinces at the time of the passing of the Confederation Act, but applicable to systems of legislation with which the whole civilized world were presumed to be familiar.

The Dominion Parliament, and that parliament alone, can determine whether the legal relation of bankrupt or insolvent shall be created out of any given combination

of facts or circumstances, but there would seem to be a difference of opinion as to the true meaning to be attributed to the language of Lord Selborne.

Judgment.
BURTON,
J.A.

It appears to be thought by some that he was not dealing with the well known legal sense of the terms, "bankrupt" or "insolvent," but that the words had relation to all persons unable to pay their debts in full, and in that sense therefore insolvent, and not to persons declared by competent authority to be bankrupt or insolvent.

"What business man," said one of the counsel, who was contending that this Act was *ultra vires*, "could suppose for a moment on reading the title to this Act (R. S. O. ch. 124), or the language of the first section, that it was not insolvency legislation?" But with great respect, that is not the test. A business man not versed in legal terms, would very likely so understand the enactment; but the question is, what is the true construction of the words used by the Imperial Legislature when dealing with the distribution of legislative powers, and when we find these powers included with other classes of subjects of national and general concern, such as trade and commerce, and find also that power is given in the same general terms to deal with property and civil rights to the Legislatures of the Provinces, we are driven to enquire how far those general words are qualified by anything appearing in section 91. If the meaning of the words in question is not such as I suppose—a power to declare who shall be bankrupt or insolvent and to legislate in reference to them—it would follow that Parliament could deal with persons unable to pay their debts in each Province, and the powers of the Province in respect to any such matters would be gone. That I venture to think was never intended, but the words must receive a more limited construction, and probably be treated in the same way as the words "regulation of trade and commerce" have come to be construed, as confined to matters of national or general concern affecting the whole Dominion.

The statute, the section of which we are considering, with

Judgment. the exception of the provisions against preferences, was
BURTON, on our Statute Book since 1858, and for a long period when
J.A. we had a Bankrupt or Insolvent Act, but it was always
construed like the Statute of Elizabeth, and never treated
as an Insolvent Act, nor was a person availing himself of
its provisions ever spoken of as an insolvent, although he
was in a state of insolvency in the sense that he was unable
to meet his liabilities.

That it would extend to all persons unable to meet their liabilities is evidently the view entertained by the late Chief Justice of the Supreme Court in *Regina v. Chandler*, 2 Cart. 421. That case was decided shortly after Confederation, and would scarcely be so decided at the present day.

The matters dealt with by the statute come clearly within the definition of property and civil rights, and the onus is therefore upon those who attack it to shew its invalidity. I find it very difficult to understand upon what ground local legislation making provision for the distribution of a man's estate among his creditors, and even for his discharge, can be impugned as being beyond local jurisdiction.

In the case of *Edgar v. Central Bank*, 15 A.R. 196, I went in detail over several of the other sections of the Act, but abstained from expressing any opinion upon this particular section, as it was unnecessary then to do so; but the same reasons which I thought then sufficient for upholding the validity of those sections apply, I think, equally to it, and I should, therefore, if at liberty to express my own opinion, answer the question submitted in the affirmative, but a decision of the Supreme Court, by which I am bound, appears to me, as I understand it, to prevent my doing so.

In that case (*Quirt v. The Queen*, 19 S. C. R. 510), a bank professing to be possessed of assets exceeding its liabilities, executed a deed of arrangement for the benefit of its creditors, with a resulting trust to the shareholders of the bank.

This was previous to Confederation. Subsequently the Dominion Parliament incorporated the trustees, and professed to confer upon them additional powers to those given to them by the deed of assignment, and professed to ratify the deed.

Subsequently, and after the bank's charter had expired, the Dominion Parliament passed an Act to transfer the assets so assigned from the trustees to the Crown.

The assignment was one which, if it offended against any of the provisions of our Provincial Assignment Act—if, for instance, it had given a preference to one creditor or one class of creditors over another—might have been avoided.

I express no opinion as to whether the powers of the Dominion Parliament in reference to bankruptcy and insolvency are confined to a general Bankrupt or Insolvent Act, or whether they could pass a special Act for the winding up of the affairs of some particular company; it is sufficient to say that that was not the legislation which took place in the case of this bank. Conceding for the moment that they might in a private Act have declared this bank insolvent, according to the definition which I have placed upon it, they did not do so; on the contrary they recognized the assignment which, as I have pointed out, would have been void as against creditors if it offended against the Provincial Act.

The fact that this assignment was made by a bank cannot, in my opinion, affect the question. If the Dominion Parliament could deal with it, they could equally deal with an assignment by any commercial firm, whom, by a parity of reasoning, they could by special enactment have declared bankrupt or insolvent.

I do not at all doubt the power of the Dominion, in a case coming within their legislative powers as to bankruptcy and insolvency, to make a statutory conveyance of the bankrupt's estate, but the foundation here was wanting. They were not dealing with a bankrupt's estate. They were dealing with an assignment, with which alone, in

Judgment.

BURTON,
J.A.

Judgment. my judgment, the Provincial Legislature had power to
BURTON, legislate.
J.A.

I respectfully differ from the learned Judges who placed some reliance on the fact that the views of the Provincial Legislature at its first session seemed to recognize the Dominion legislation, that I submit cannot affect the construction of the British North America Act.

As I understand that judgment, if an assignment had been made by an individual or a commercial firm, who by special legislation the Dominion Parliament could declare insolvent, but who had not been declared insolvent, they could validate an assignment made by him or them although it was void under our Preference Act. I think, myself, that the Local Legislature could alone validate such an assignment.

The Supreme Court places its judgment on the effect of the language "bankruptcy and insolvency" in the British North America Act. The bank here never was declared bankrupt or insolvent, and could not be so declared except by an Act of the Dominion Parliament. The conclusion therefore is irresistible that the Supreme Court has decided that a person insolvent within the meaning of R. S. O. ch. 124, or in insolvent circumstances, and making an assignment, is brought within this definition of insolvency within the British North America Act.

If that be so, the Act must be beyond the jurisdiction of the Province, and the power to deal with such an assignment must be exclusively vested in the Dominion, and that view must, I apprehend, now be regarded as the law of the land, and so I am constrained to answer the question in the negative.

If this is insolvency legislation, as the Supreme Court seems to hold, the whole enactment would seem to be *ultra vires*.

OSLER, J. A., said that for reasons given by him on a former occasion, he did not feel called on to answer a question submitted in this way.

MACLENNAN, J.A. :—

Judgment.

MACLENNAN,
J.A.

The question we are asked to decide is whether the Legislature of Ontario had authority to enact section 9 of R. S. O. ch. 124.

It was enacted originally on the 30th March, 1885, as a section of an Act, 48 Vic. ch. 26, entitled "An Act respecting Assignments for the Benefit of Creditors." Several amendments have been made to this Act since it was first enacted, and section 9 has also been amended, but the amendment has not affected the question of its validity. Neither at the time the section was first enacted nor at any time since has there been any bankruptcy or insolvency law of the Dominion in force, except the Winding Up Act, which applies only to banks and other incorporated companies, and perhaps some special Acts for settling the affairs of companies, such as the Acts relating to the affairs of the Bank of Upper Canada. The Insolvent Acts which had been in force in the province continuously from the time of Confederation until the year 1880, had been repealed on the 1st of April in that year, by the Act 43 Vic. ch. 1 (D.) entitled "An Act to repeal the Acts respecting Insolvency now in force in Canada." And the Winding Up Act was passed in 1882. In March, 1888, the constitutional validity of the provincial statute was raised in four cases in this court, namely *Clarkson v. Ontario Bank*, *Edgar v. Central Bank*, and two others, all reported together in 15 A. R. 166, and the Court was equally divided on the question. The learned Chief Justice and Mr. Justice Osler were of opinion that the whole Act, except the first two sections, was invalid, and Mr. Justice Patterson and my brother Burton were of a contrary opinion. The last named judges, however, reserved from their judgment the section now in question, and expressed no opinion upon it.

After the best consideration which I have been able to give to the question I have arrived at the opinion that the section is valid. I adopt the reasoning, in the cases re-

Judgment. referred to, of Mr. Justice Patterson and my brother
MAULENNAN, J.A. Burton, and also of the late Master Dalton in *Union Bank v. Neville*, 21 O. R. 152.

The question depends on the sense in which the words "bankruptcy and insolvency" are used in the B. N. A. Act, section 91. In *Regina v. County of Wellington*, 17 A. R. 421, I said I thought that the power of legislation over bankruptcy and insolvency which was intended to be conferred on the Dominion Parliament was the same as had been exercised by the Imperial Parliament and by the Provincial legislatures before Confederation, namely the passing of laws more or less general in their application with proper courts and procedure and machinery for carrying them into effect, and not Acts declaring a particular person or firm or corporation bankrupt or insolvent, or putting their affairs into a course of liquidation. Upon appeal from our judgment in that case, however, it was held unanimously that this was an erroneous view of the statute, and that an Act for the settlement of the affairs of a particular insolvent bank, the late Bank of Upper Canada, was within the powers of parliament as bankruptcy and insolvency legislation: *Quirt v. The Queen*, 19 S. C. R. 510. It is therefore now decided that Parliament may not only pass a general law of bankruptcy and insolvency, but may deal with particular cases; and it seems to follow that it might pass an Act for settling the affairs of a single firm or individual, being indebted.

I think, however, it does not follow from that decision that the enactment in question in this appeal is invalid, as an invasion of the exclusive legislative domain of Parliament. It merely declares that assignments for creditors shall take precedence of all judgments and executions not completely executed by payment. I confess I am altogether at a loss to understand why this should be regarded as bankruptcy or insolvency legislation. The assignment which is spoken of is a purely voluntary act. It is an act which is optional with the debtor, and being made, the statute (section 4) gives it the effect of passing the whole of his property, by

the mere use of a certain form of words. In this respect section 4 is analogous, as was pointed out by Mr. Justice Patterson, in *Edgar v. The Central Bank*, 15 A. R. at p. 210, to conveyances, leases and mortgages, made under the Acts respecting short forms of those kinds of instruments. This short form of assignment did not give the debtor any new power, but only enabled him to do, by the use of a short instrument, what he could have done by a longer one. Now the effect of the assignment without the aid of section 9 now under consideration is to vest in the assignee property under seizure by the sheriff, as well as all other property of the debtor, subject only to the lien of the execution, and all that the section in question does is to displace that lien and to put the execution creditor on a par with the other creditors. In effect it says that an execution shall not be a lien on property seized, as against an assignment for creditors, until it is actually sold thereunder.

Judgment.

MAOLENNAN,
J.A.

When the Act says that the assignment is to take precedence of executions, it does not mean that the execution creditor is to be postponed to other creditors, but only that executions must give way to the assignment, and that the execution creditor must take his proportionate share of the estate with other creditors. It is merely a change of the law of the province as to executions. Formerly executions had priority in the order of their delivery to the sheriff or other officer for execution. That order of priority has been done away with by the Creditors Relief Act, R. S. O. ch. 65, passed in 1880, and I understand that my learned brothers do not doubt the power of the Legislature to make that change. The section in question further changes and qualifies the effect of an execution. It is now liable to be superseded by an assignment made at any time before a sale. If the Legislature can abolish priority between executions, so that a later execution creditor is put on an equality with an earlier one, why can it not abolish priority between an execution creditor and creditors who have no executions, so that the latter shall stand on an equality with the former? If the one is not bankruptcy

Judgment.
MAULENNAN,
J.A.

and insolvency legislation, I am unable to see why the other should be so regarded. It is merely the effect and operation of an execution which has been altered by legislation in each case.

But I incline to the opinion that except so far as the Dominion chooses from time to time to occupy the field of bankruptcy and insolvency legislation, the Province may occupy it. I think that follows from the manner in which their respective powers are defined by sections 91 and 92 of the B. N. A. Act. In *Citizens Insurance Co. v. Parsons*, 7 App. Cas. at p. 110, it was decided by the Judicial Committee that the phrase "property and civil rights in the province" employed in No. 13, section 92, included rights arising out of contract, and therefore those words embrace the whole law of debtor and creditor. What the Act does then is to give the whole field of property and civil rights to the Province, and then to give to the Dominion that part of it which answers to the description of bankruptcy and insolvency. Bankruptcy and insolvency are excepted or subtracted from the general field of property and civil rights. Now if "bankruptcy and insolvency" was susceptible of clear definition apart from legislation, like "bills of exchange and promissory notes," "patents of invention," "copyright" and the like, there would be no difficulty in saying with reference to any particular act of legislation that it was or was not within the exception, and so that it was or was not within the power of the Province. But apart from legislation it is not definable. Apart from legislation there is no such thing as bankruptcy or insolvency. Parliament may pass Acts of that character, and when it does the subject is defined, and we can see what it is. Whatever part of the field of property and civil rights it occupies for that purpose is taken away from the Province, but no more. So far as any such Act extends, the law of the Province must yield and is overborne, but beyond that it is the power and duty of the Province to care for the public interest and to enact and enforce proper laws in relation to property and civil rights.

Bankrupt and insolvent laws are not a necessity, are not an essential part of every system of jurisprudence or of government. There may or may not be such laws. If Parliament thinks fit to have such laws it has the exclusive power to enact them, but it is not obligatory, and if there be no such law, it is still necessary that there be some law of debtor and creditor, and that subject is expressly given to the Province.

Judgment.

MACLENNAN,
J.A.

There was no such thing as bankruptcy or insolvency at the common law. There was no distinction between the fraudulent or insolvent debtor, and any other debtor, who did not pay his creditors. There was the same remedy against all by action, judgment, and execution; and all debtors alike were held bound until full payment. Bankruptcy and insolvency therefore are wholly the creatures of legislation, and without legislation they do not and cannot exist.

The impossibility of defining bankruptcy in the abstract, and apart from legislation, is apparent from the history of the subject. The first Bankrupt Act in England was the Act 34 & 35 H. viii. ch. 4, in the year 1542, and between that time and the passing of the Act 24 & 25 Vic. ch. 134, which was in force when the B. N. A. Act was passed, a very large number of such Acts was passed, changing the character of the legislation from time to time. The Acts which were passed prior to 1823 will be found printed *in extenso* in the 1st volume of the 8th edition of Cook's Bankrupt Laws (1823), and an examination of them will shew how the definition of the subject changed from time to time with the legislation. That change is shewn strikingly by a comparison between the Act of H. viii., and the Act of 24 & 25 Vic. in 1861. The Act of H. viii. makes no reference whatever to inability to pay or insufficiency of assets. It is directed against fraudulent debtors only. Bankrupts are described as "persons who, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors,

Judgment, their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience." The Lord Chancellor and other high officers are authorized to seize and distribute the estates of such debtors among their creditors, and it is provided that if the creditors be not satisfied by these means, they may still recover the residue by ordinary process as before the Act. That continued to be the law of bankruptcy for a long time, and the changes which were made afterwards, were made gradually, until by the law of 1861 all persons, whether traders or non-traders, whether honest or dishonest, whether they were or were not possessed of sufficient property to pay their debts in full were made subject to the law, in case they had committed certain defined acts or defaults. These acts and defaults are enumerated at p. 127, of 1 Doria & Macrae's Law of Bankruptcy (1863), and some of them are the following: Nonpayment after judgment debtor summons by either trader or nontrader; suffering execution to be levied on any of his goods and chattels for any debt exceeding £50 by a trader; and nonpayment within seven days by a trader, and within two months by a nontrader, after decree or order peremptory in equity, bankruptcy or lunacy. Prior to the Act of 1861 and as far back as the 13th Elizabeth the law was confined to traders; as to all other persons there was no such law. The history of the subject in this country shews the same variety in bankruptcy legislation. In the Provinces of Ontario and Quebec there had been a Bankruptcy Act in force more or less from 1843 to 1856, when it expired; after which there was none until 1864. The Act of that year was called "The Insolvent Act of 1864," and although called an Insolvent Act it was in reality a Bankruptcy Act, and it was made applicable in Lower Canada to traders only, but in Upper Canada to all persons whether traders or not. This is the Act which was in force in Ontario and Quebec when the B. N. A. Act was passed, and while it was undoubtedly in its nature a

Bankruptcy Act, it differed in many respects from the English Act. I do not know what, if any, bankruptcy or insolvency laws existed at that time in any of the other Provinces of the Dominion.

Judgment.
MACLENNAN,
J.A.

The Act of 1864 was repealed in 1869, and a new Act was passed extending to the whole Dominion called "The Insolvent Act of 1869." It was confined to traders, and any trader unable to meet his engagements might either take the benefit of it voluntarily, or might under defined circumstances be compelled to do so. The Act of 1869 was re-enacted with considerable alterations in 1875, and was still confined to traders. This law continued in force until 1880 when it was repealed, and since that time there has been no Dominion law of bankruptcy or insolvency, except, as already stated, the Winding Up Act, which is confined to corporations, and perhaps some special Acts relating to particular cases, such as the Bank of Upper Canada Act. What I mean is that there has not been since that time and there is not now any general Act of the Dominion, taking up or occupying any certain part or section of the law of debtor and creditor for its operation as a law of bankruptcy and insolvency. While there was such a Dominion law the law of the Provinces had to give way. Parliament could declare, and did declare, that to the extent defined in that law the relations of debtor and creditor were to be regulated and adjusted by and under that law. Within its limits was the realm of bankruptcy and insolvency, which Parliament had appropriated to itself. All without those limits which concerned the same relation was left to the Legislature of the Province, as being a part of property and civil rights. While the Act was in force it seems clear the Province could deal with everything outside of it, and when it was repealed I think the whole field was left to the Province. I think therefore the true solution of the question is, that Parliament may pass laws of bankruptcy and insolvency, and may thereby define the nature and extent of its interference with the law of the Province for that purpose, can make

Judgment. that interference more or less extensive according to its
MACLENNAN, pleasure, and that to such laws while they are in force the
J.A. laws of the Provinces must give way, to all intents and purposes. But unless and until Parliament do pass such laws the legislative power of the Province is not interfered with, and it is free to occupy the whole field. While the Dominion Acts are in force the field of bankruptcy and insolvency is defined. When they are repealed definition is impossible, for the thing has ceased to exist.

When the B. N. A. Act was passed bankruptcy was a different thing in England from what it was in Ontario, and different in Ontario from what it was in Quebec. The Act of 1864 was applicable to all persons in Ontario, while in Quebec it was confined to traders; and the Acts of 1869 and 1875 were confined to traders in all the Provinces, and I think it can hardly be doubted that the Acts were so restricted in order to leave other debtors to the operation of the laws of their respective Provinces, as they might be modified by their respective legislatures.

If we are to take our definition of bankruptcy and insolvency from the laws existing at the time of the passing of the B. N. A. Act, which laws are to be our guide? Is it the Imperial Bankruptcy Act, or the Insolvent Act of 1864, or the law of some other Province? If the Act of 1864, shall it be as it applied to Ontario, or to Quebec? It seems impossible to say that any or either of these can afford a governing rule or a permanent definition of the term "bankruptcy and insolvency"; and if not, and if we must find a definition without reference to an actual statute on the subject, there would seem to be no alternative but to include everything that might be dealt with by such a law. It must be conceded that among the legitimate subjects of such a law may be included the definition and punishment of frauds by debtors upon their creditors; and the compulsory application of the estates of debtors whether fraudulent or not, and whether actually insolvent in the sense of a deficiency of assets or not, in payment of their creditors. If that be so, it seems clear that a bankruptcy

or insolvency law might go the length of providing that the property of every person who failed to pay a debt at maturity should *ipso facto* be vested in the sheriff or other public officer for the payment of all his debts, and that no action or suit should be necessary or proper for the recovery thereof.

Judgment.

MACLENNAN,
J.A.

I see no reason why Parliament could not go that length. A bankruptcy law is a law for the recovery of debts, and it might thus become the only law. So also Parliament might, as incident to such a law, declare all transfers of property and payments made by a debtor within a defined period, whether for value or not, to be void and to be reconveyed or paid back.

The argument in the present case is that because the provision in section nine is one that might reasonably be inserted in a bankruptcy or insolvency Act, the Legislature could not pass it. If that be so I think it follows that the Legislature can pass no Act whatever for the recovery of debts. A bankrupt law might do that, and therefore any law for the purpose is bankruptcy legislation and *ultra vires*. If the argument is to prevail then the Province cannot touch the subject of the recovery of debts at all; can make no law for compulsory payment; no law of frauds upon creditors, or any law of preferences, or to secure equality of distribution. The method by which debts are to be recovered must be regulated by Parliament, and inasmuch as bankruptcy and insolvency legislation may extend to and include procedure, that also is taken from the Province; and so far as the Judicature Act deals with actions for debts it is all *ultra vires*. I do not think that is the meaning of the words as used in the B. N. A. Act; but that inasmuch as the field of bankruptcy and insolvency is in itself indefinite, and may be more or less extensive according to the will of Parliament, I think the true construction of the Act is that Parliament can pass such bankruptcy or insolvency legislation as it thinks fit, and that so far as it does the provincial law is overborne. But I think that until Parliament passes such a law, and outside its limits when it is passed,

Judgment. the jurisdiction of the Province over property and civil
MAOLENNAN, rights is unimpaired and unaffected.

J.A.

As has been stated, Parliament in 1880 repealed its law of bankruptcy and insolvency, and thereby as I conceive the law relating to the payment of debts was left free once more to the legislation of the Provinces, and it was in my opinion competent to the Province of Ontario to pass the enactment in question subject to be overborne and displaced if and whenever the Dominion, in the exercise of its jurisdiction over bankruptcy and insolvency, shall think fit to make other provisions.

In my judgment therefore the Legislature of Ontario was competent to enact the section in question.

BROWN V. MOYER.

Defamation—Libel—Justification—Fair Comment—Pleading—Evidence.

Under a defence of "fair comment" in a libel action, evidence of the existence of a certain state of facts on which it is alleged the comment was fairly made is admissible, but not evidence of the truth of the statement complained of as a libel.

Wills v. Carman, 17 O. R. 223, discussed.

Judgment of the Chancery Division, 23 O. R. 222, reversed.

THIS was an appeal by the plaintiff from the judgment Statement. of the Chancery Division, reported 23 O. R. 222.

The plaintiff was a member of the council of the town of Berlin, and brought the action to recover from the defendant, who was the proprietor of the "Berlin Daily News," damages for certain alleged libels concerning the plaintiff, contained in an article published in that paper. The article in question is printed *in extenso* in the report of the case in the Court below, and the facts are there stated at length. In the defence it was pleaded that the alleged libel was part of an article commenting on a matter of public and general interest, the granting of certain exemptions, and on the action of the plaintiff as a member of the municipal council upon that matter.

The action was tried before STREET, J., and a jury, at Berlin, on the 24th of October, 1892, and against the objection of the plaintiff evidence of facts connected with the giving of the proposed exemptions and as to the general character of the plaintiff was admitted. The jury gave a verdict in favour of the defendant, and the plaintiff's motion against this verdict was dismissed by the Divisional Court.

The plaintiff then appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 26th of May, 1893.

J. King, Q. C., for the appellant. There being no plea of justification, evidence was improperly admitted justify-

Argument. ing the libellous words complained of : *Davis v. Shepstone*, 11 App. Cas. 187 ; *Belt v. Lawes*, 51 L. J. Q. B. 359. The evidence objected to by the appellant was admitted under *Wills v. Carman*, 17 O. R. 223, but that decision, it is submitted, is not authority for what was done at the trial of the present action, and is clearly distinguishable. The facts commented on should appear either in the defamatory article or the pleadings. *Wills v. Carman* was based on a series of decisions in which the facts commented on appeared both in the article and the pleadings, and the appellant could not be expected to be prepared for an extension of that decision to this case : *Riordan v. Willox*, 4 Times L. R. 475 ; *Lord Hindlip v. Mudford*, 6 Times L. R. 367. Evidence was also improperly admitted as to matters outside of those commented on in the respondent's libellous article, and as to acts and conduct of the appellant in relation to such matters, which were calculated to prejudice him before a jury, and there was an improper rejection of evidence in reply to the evidence received tending to justify the libel. The verdict was perverse in finding that the publication complained of was not libellous, and the language complained of was not fair comment : *Davis v. Shepstone*, 11 App. Cas. 187 ; *Merivale v. Carson*, 20 Q. B. D. 275 ; *Phillips v. Martin*, 15 App. Cas. 193.

E. F. B. Johnston, Q. C., for the respondent. The finding of the jury that there was no libel is conclusive. The words complained of either with or without the innuendo are not libellous, and the verdict is proper and reasonable. But the statements are in any event fair comment, and this has been so found by the jury, who are the sole judges of that, and the verdict should not be disturbed. Evidence in strict justification was not admitted at the trial, but the evidence complained of was given to shew that the comment was fair and *bonâ fide* ; this sort of evidence was essential, and was properly admissible under the defence of fair comment on a matter of public interest. The respondent was entitled to show all the facts and circumstances relevant to the act or matter commented upon, and it was

not necessary to set them forth in the pleadings. The only ground of objection to such evidence would be that of surprise, and no such ground was alleged, and no postponement of the trial was asked for. The facts commented on are sufficiently indicated in the article, and the statement of defence, assuming that, as a matter of law, they should appear therein: *Wills v. Carman*, 17 O. R. 223; *Odgers on Libel*, (Bl. ed.), p. 449. Argument.

J. King, Q. C., in reply.

June 21st, 1893. HAGARTY, C. J. O. :—

It seems that the defence of fair comment is based upon acts of the defendant as a member of the town council, and as to how he is said to have influenced the council in doing some alleged disreputable act.

I think the learned Judge might fairly have admitted evidence as to what took place at such meetings, and as to the plaintiff's conduct there.

But I think that a mass of evidence was admitted going into the merits of a question between the council and some persons claiming exemption from taxation on some alleged representations and acts done long before between persons named Jackson and Cochrane and members of the council, utterly irrelevant to the issue and inadmissible. I refer to a large number of matters allowed to be spoken to by the mayor and others.

It was no part of the duty of the jurors to hear and determine the actual merits of the dispute between the council and Jackson and Cochrane, or to decide whether the council were doing a disreputable act in deciding on the merits of this dispute.

We give the plea of fair comment every proper latitude in confining it as above suggested.

It seems to be an attempt at justifying the libellous language as true in fact.

That it was a question of public interest, being in refer-

Judgment.

HAGARTY,
C.J.O.

ence to exemption from taxation, is clear; the defendant says he commented fairly on the plaintiff's conduct as a member of the municipal council upon the matter.

I think great latitude was allowed to the defendant in being allowed to prove what he did as to the meetings of council, possibly too wide a latitude having regard to the language of his plea, but he succeeded in forcing before the jury a large amount of evidence as to the alleged merits of the controversy as to the taxation exemption, which I am satisfied was wrongly received.

I do not understand the case of *Wills v. Carman*, 17 O. R. 223, in any way supports the admission of the evidence here objected to. All we can find is that on a plea of fair comment on the conduct of a county treasurer a report of a committee of the county council appointed at the plaintiff's own request was allowed to be put in evidence. The distinction seems well pointed out. It is not the truth of the facts, but the existence of a certain state of facts on which it is alleged the comment was fairly made.

If the facts alleged here that it was a matter of public interest, and that the plaintiff was a member of the council discussing certain relevant matters did not exist, the defence must fail. The foundation has to be laid.

Apart from the question as to the admission of evidence, the learned Judge's charge seems to have been very fair and open to no objection.

But I cannot read the proceedings at the trial without strongly believing that the question was rather one as to the merits of the controversy between Jackson and Cochran and the council than a fair trial of the point whether defendant's plea of fair comment was proved or not.

The law is very clearly stated in such cases as *Lord Hindlip v. Mudford*, 6 Times L. R. 367, and the distinction between the defence of justification and fair comment is well defined. See also *Kelly v. O'Malley*, 6 Times L. R. 62.

BURTON, J. A. :—

Judgment.

BURTON,
J.A.

If I had been called upon to say whether the language used in the article complained of was fair comment upon the plaintiff's conduct as a municipal councillor upon the matter before them for discussion I should have had very little hesitation in holding that it was not—fair criticism deals only with a man's acts and not with the man's private character or business ; but then it is a question for the jury and their finding is not to be interfered with unless the ground for interference be overwhelmingly strong.

I do not agree, if that is the interpretation put upon *Wills v. Carman*, 17 O. R. 223, that the defendant can, without a plea of justification, give evidence to shew that the statement complained of as a libel is true.

It is, of course, essential to give evidence of all the facts occurring at the meeting of council in which the discussion occurred, and of the facts which gave rise to such discussion, otherwise it would be impossible to say whether the article complained of was a fair comment or not ; if it is a fair comment, it is an excuse for what would otherwise be a defamatory publication.

Thus stated it will be manifest how fine a line exists between the defence of fair comment and a justification of the libel complained of, as here, and how necessary it is therefore to exclude all evidence which would be applicable solely to a plea of justification.

I think there is evidence here which goes far beyond a statement of what occurred on the occasion referred to, and was only receivable to prove a justification. For instance the defendant is asked ; In connection with his public action you used the word "crank," *bond fide* believing it characterized him fairly well. To which he answered : I believe it is a fair description of the man—a fair description (not of his conduct on this occasion) but of his general conduct in public.

Then again he gives evidence to justify the use of the

Judgment.

BURTON,
J.A.

word "illiterate," by stating "that his style of writing his reports and things in general," was his reason.

And again, he speaks of him generally of having his own way too much, being "pernickety"—and of his having moved for the unseating of a number of members of the council—the mayor on one occasion.

Then again the sarcastic reference to his having been singularly fortunate in business and business partners, which had no connection with this discussion, and could only be admissible as justifying the use of the epithets applied to him in the article and not as fair comment.

There are other passages which would only have been relevant had there been an issue on the record justifying the words used.

I think *Wills v. Carman*, 17 O. R. 223, is somewhat misleading. I think all that was intended to be decided in that case was that it was necessary to show the existence of a certain state of facts, in order to see whether the publication sought to be excused was a fair comment on them. These facts it is true, must be actual facts, not facts existing only in the mind of the writer, and then commented on.

I am of opinion that some of the evidence admitted here had nothing to do with the facts upon which the article complained of was a comment, but was admissible only on an issue justifying the use of the defamatory words applied to the plaintiff, and that the verdict should therefore be set aside with costs and a new trial granted.

OSLER, J. A. :—

I agree with the learned Chancellor that a new trial ought to be granted in this case.

It seemed to me on the argument of the appeal that the case had been tried as if the defendant had pleaded a plea of justification instead of merely a defence of fair comment, and I pointed out the evidence which I thought objectionable, but which had been admitted

contrary to objection on the supposed authority of *Wills v. Carman*, 17 O. R. 223. I do not read that case as laying down any such proposition as that under a defence of fair comment a defendant may prove the truth of the alleged libel, as if he had pleaded the defence of justification. Since the argument, the report of the recent case of *Manitoba Free Press v. Martin*, 21 S. C. R. 518, has appeared, which is a clear authority to the contrary if one were needed.

Judgment,
OSLER,
J.A.

It is to be regretted that we are compelled to do anything which tends to prolong this litigation. I hope that time has now cooled the feelings of the parties, and that both will agree to drop a law suit that can never be profitable to either of them.

MACLENNAN, J. A. :—

I agree.

Appeal allowed with costs.

REGINA V. POTTER.

*Intoxicating Liquors—Refusal to Admit Officer—Liability of Licensee for
Offence of Servant—R. S. O. ch. 194, secs. 112, 130.*

Per HAGARTY, C. J. O., and MACLENNAN, J. A. Under section 112 of the Liquor License Act, R. S. O. ch. 194, the licensed hotel-keeper is personally responsible for the refusal of his servant to admit an officer claiming the right of search under section 130.

Per BURTON, and OSLER, J.J.A. Section 112 does not apply to an offence of that kind, but is limited to offences connected with sale, barter, and traffic.

In the result the judgment of the County Court of Frontenac, quashing the conviction, was upheld.

Statement. THIS was an appeal by the Attorney-General for Ontario from the judgment of the County Court of Frontenac quashing a conviction.

The defendant, who was a licensed hotel keeper in the city of Kingston, was convicted by the police magistrate of Kingston, "for that he the said William H. Potter on the 7th of August, 1892, at the city of Kingston, (his bartender Clinton Struthers being present, and in charge) unlawfully did fail to admit William Glidden, the inspector of licenses in and for the said city, to the bar-room in his licensed premises on the demand of the said inspector to be admitted thereto in the execution of his duty," and he was ordered to pay \$50.00 fine and \$2.35 costs, or in default to be imprisoned for three months with hard labour.

The evidence in the case was to the effect that on a Sunday afternoon between two and four o'clock the inspector entered the hotel, and seeing the bartender in a passage adjoining the bar-room demanded admittance to the bar-room in the execution of his duty. The bartender refused to admit the inspector saying he could not do so, but giving no reason. At the time the defendant was upstairs and had the key of the bar-room in his possession.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 11th of May, 1893.

J. R. Cartwright, Q. C., for the Crown. There has unquestionably been an offence committed within the

meaning of section 130 of the Liquor License Act, R. S. O. ch. 194, and the only question is whether or not the defendant is personally responsible. It is submitted that under section 112 (1) of the Act the defendant is personally responsible for the offence of the bartender. That section has a clause making it applicable to all offences under the Act. Argument.

J. McIntyre, Q. C., for the respondent. Section 112 (1) does not apply to an offence of this kind at all, but only to offences to which sections 70 and 71 are directed. The section is a composite one, and is made up from 37 Vic. ch. 42, sec. 52 (O.), and 40 Vic. ch. 18, sec. 25 (O.). The second part refers only to the mode of proof, and although there are in it some superadded general words it cannot properly be construed to be wider than the first part, which is expressly limited to offences in connection with sale, barter, and traffic. The general words, "or any matter, act, or thing," are simply inoperative. If not the most absurd results would follow. For instance, under section 73 a penalty of \$10 is fixed for the offence therein mentioned. If, however, section 112 applies to all offences under the Act, then the master for the servant's offence under section 73 would be liable to a penalty of \$50. Moreover, in the latter part of section 112, the words "such sale," etc., are used, evidently referring to the preceding clause. Apart from the statute there would be no liability on the part of the respondent: *Chisholm v. Doulton*, 22 Q. B. D. 736; *Bosley v. Davies*, 1 Q. B. D. 84; *Regina v. Stephens*, L. R. 1 Q. B. 702.

J. R. Cartwright, Q. C., in reply. To hold that section 112 applies only to sections 70 and 71, would be to make it inoperative to a great extent. The apparent absurdity has no real foundation. If an offence is committed for which no specific penalty is fixed than the penalty mentioned in sections 70 and 71 may be applied, while if there is a specific penalty for the offence that is the one to be enforced. It is only as to the mode of proof that the section requires to be universally applied.

Judgment. June 21st, 1893. HAGARTY, C. J. O.:—

HAGARTY,
C.J.O.

It was not contended that the evidence did not shew an offence under the Act against some one.

The learned Judge says: "The question of law is, whether or not the appellant was liable under section 112, R. S. O. ch. 194. I have not been able to come to a satisfactory conclusion in my own mind; and shall allow the appeal, in which case the parties will be able to get opinion of the Court of Appeal and an authoritative construction of section 112."

This section 112 enacts that the occupant of any house etc., in which any sale, barter, or traffic of liquors, etc. or any matter, act, or thing in contravention of any of the provisions of this Act, has taken place, shall be personally liable to the penalty and punishments prescribed in sections 70 and 71, as the case may be, notwithstanding such sale, etc., be made by some other person who cannot be proved to have so acted under or by the directions of such occupant, and proof of such sale, etc., or other act, matter, or thing by any person in the employ of such occupant, or who is suffered to be or remain in or upon the premises, etc., or to act in any way for such occupant, shall be conclusive evidence that such sale, etc., or other act, matter, or thing took place with the authority and by the direction of the occupant.

Sub-section 2. The person actually selling or otherwise contravening the Act, is styled the "actual offender," and he as well as the occupant shall be personally liable to the punishments prescribed in sections 70 and 71, and at the prosecutor's option one or both may be prosecuted though only one shall be convicted.

The conviction here was under section 130, which enacts that any officer, etc., for the purpose of detecting the violation of any of the provisions of the Act, may at any time enter a tavern, etc., and search in every part thereof, etc.

Sub-section 2. Every person being therein or having charge thereof who refuses or fails to admit the officer

demanding to enter, etc., or who obstructs the entry, etc., shall be liable to the penalties, etc., prescribed in section 70.

Judgment.

HAGARTT,
C.J.O.

Section 70 declares that any person selling liquors without license, shall pay for first offence not less than \$50 and costs, and not more than \$100, with, in case of default, not less than three months at hard labour, in the discretion of the magistrate, and so on as to subsequent convictions.

Section 71 directs a penalty of not less than \$20, nor more than \$40, for offences against sub-section 1 of section 54; and further, as to subsequent convictions.

This section 54 is aimed against selling or trading in licensed houses from seven o'clock Saturday till six on Monday, and against permitting liquors to be drunk during such hours.

Again, sub-section 2 of section 71 imposes a penalty of from \$2 to \$10 on offences against sub-section 1 of section 58, which refers to persons buying or obtaining liquors during the prohibited times.

I do not feel pressed by the difficulty suggested by the learned County Judge. Section 112 seems to me fully to meet the case. The occupant (the present defendant) was in the house when this matter occurred. Struthers, who refused admittance to the bar, was his servant in charge of the bar; he was accessible at any moment; he admits having the key in his possession.

The defendant was examined and made no attempt whatever to deny Struthers' authority to act as he did, or in any way to induce a belief that all that was done was without his authority.

I think the section was framed to meet such a case as this, and does fully meet it in fixing the actual occupant of the premises with personal liability.

It seems plain to me that it covers all matters done in contravention of the provisions of the Act, and settles the extent of liability of the principal for the acts of his servants.

Judgment.

HAGARTY,
C.J.O.

The reference in section 112 to the penalties in sections 70 and 71, "*as the case may be*," seems unfortunate and calculated to raise doubt, but only on the question of penalty.

Section 70 by itself only provides a punishment for selling liquor without license.

Section 71 provides penalties for offences under sections 54 and 58, which are as to selling, etc., within prohibited hours, and as to the buyers of liquors within such hours. These are offences in contravention of the Act, and are specially punishable in much lesser penalties than that in section 70.

But section 130, which creates the present offence as to refusal to admit the officer, declares the punishments to be those prescribed by section 70, which only provides the one punishment for the one offence, that is selling, etc., without license. This, I think, leaves the penalty sufficiently clear and distinct.

Thus section 112 merely deals with the liability of the occupant without proof of authority to the person actually guilty of the prohibited act, and the references to the two sections 70 and 71 cannot, I think, prevent its application to this case. .

I wish to add that I am not prepared to say that even if no such clause as section 112 were in the Liquor Act the present defendant as occupant of this tavern would not be liable to this conviction for the act of his bartender and servant on the evidence here adduced.

I refer to the judgment of Gwynne, J., in *Regina v. Williams*, 42 U. C. R. 462, and to such cases as *Bond v. Evans*, 21 Q. B. D. 249; *Brown v. Foot*, 17 Cox C. C. 509.

I think the appeal should be allowed, and the conviction affirmed.

MACLENNAN, J.A. :—

I am of the same opinion.

BURTON, J. A. :—

Judgment.

BURTON,
J.A.

The question is whether a licensed hotel keeper can be properly convicted under section 130 for an act of his servant, no demand having been made upon him personally, and there being no evidence that the refusal was by his authority or by his connivance.

Taking that section alone, I agree that the person actually committing the offence would alone be liable, and as to him the penalty and punishment prescribed under section 70 are to apply.

The prosecution are driven to contend that the master is liable under section 112, which makes him liable for the acts of his servant in certain cases, though done without his knowledge or authority in any way.

It provides that he shall be so liable if any sale, barter, or traffic of spirituous, fermented or manufactured liquors has taken place, and so far of course it has no application, but it proceeds, "or any matter, act or thing in contravention of any of the provisions of this Act has taken place, he shall be personally liable to the penalty and punishments prescribed in section, 70 and 71 of this Act as the case may be, notwithstanding such sale, barter or traffic be made by some other person who cannot be proved to have so acted under or by the directions of such occupant, and proof of the fact of such sale, barter or traffic, or other act, matter or thing, by any person in the employ of such occupant, * * shall be conclusive evidence that such sale, barter or traffic, or other act, matter or thing, took place with the authority and by the direction of such occupant."

Now it will be seen that all the acts mentioned in this section seems to point to something in connection with the sale, barter, or traffic, and to subject the actor and hotel keeper to the penalties prescribed by sections 70 and 71, as the case may be.

Section 70 is aimed against persons selling without a license, and provides different penalties for the first, second, and subsequent offences. Section 71 provides a

Judgment.
BURTON,
J.A.

different penalty and punishment for a violation of section 54, which deals with the sale of liquors within prohibited hours; and the whole of the acts referred to in section 112, and the punishment for them, are brought within either section 70 or 71 of the Act as the case may be. It may be difficult to say what acts, matters, or things are intended, and they appear to me to add no force to the enactment whilst they may lead to serious complications; but whatever they may be, as the two sections 70 and 71 are confined to the violations I have spoken of, they must, I think, be construed as acts *ejusdem generis* with those in immediate context with them.

But there are numerous acts for which specific penalties and punishments are provided and section 85 provides for penalties for violations not otherwise provided for.

Under an Act of this nature where something is prohibited, as for instance the selling within prohibited hours, it might be very difficult to enforce the Act if it were necessary that a *mens rea* should be essential to the offence, and therefore we find the Legislature saying that in such case the master shall be liable as well as the servant actually committing the offence; but a broad distinction may be drawn, and I think ought to be drawn, between such offences and those aimed at under section 130, where a demand is necessary.

If the Legislature think that the public interest requires that the master should be liable to be punished for the act of his servant under that section, it is an easy matter to say so, but I do not think that under this Act he should be declared so liable by judicial interpretation.

OSLER, J. A. :—

The 130th section of the Liquor License Act, which was under our consideration in the recent case of *Regina v. Sloan*, 18 A. R. 482, enacts that any officer, etc., may, for the purpose of preventing or detecting the violation of any of the provisions of the Act which it is his duty to

enforce, at any time enter into any and every part of any inn, tavern, or other house, or place of public entertainment wherein liquors are sold, etc., and may make searches, etc.

Judgment.

OSLER,
J. A.

Sub-section 2. Every person being therein, or having charge thereof, who refuses or fails to admit such officer demanding to enter in pursuance of the section in the execution of his duty, or who obstructs or attempts to obstruct the entry of such officer, or any such searches as aforesaid, shall be liable to the penalties and punishments prescribed by section 70 of the Act, the section which prescribes the penalties for selling liquor without license.

It is for an offence under sub-section 2 of section 130 that the defendant has been convicted, but there is no pretence for saying, nor has it been contended, that he was personally guilty of it or connived at it, or that it was committed by his actual or implied authority, or with his actual cognizance.

I think it is manifest that the only person who would be punishable under the provisions of section 130, looking at the language of that section alone, is the very person who, being in the premises or having charge thereof, refuses to admit the officer demanding to enter; or who obstructs him in the execution of his duty. It is pointed at a personal refusal or obstruction, or at a refusal or obstruction directly authorized by or under the instruction of the person in, or in charge of, the premises. In this instance the person refusing (assuming that there was any reasonable evidence of a refusal) was not the defendant but his servant or bartender, and it has not been argued, nor can I think there is any just ground for arguing, that, under the terms of the section, the master would be liable for the unauthorized act of his servant, so as to invoke the application of such cases as *Brown v. Foot*, 17 Cox C. C. 509; *Mullins v. Collins*, L. R. 9 Q. B. 292; *Bond v. Evans*, 21 Q. B. D. 249.

These and similar cases are quite beside the real point to be decided here, though it would be necessary to consider

Judgment.

OSLER,
J.A.

them, and to see how far the language of the Acts under which they were decided corresponded with that of section 130, if it had been attempted to support the conviction under that section alone, as making the master responsible for the act of his servant notwithstanding the absence of a guilty knowledge or connivance on his part. What the prosecution contends is that the 112th section of the Act expressly makes the defendant responsible in such a case. No doubt if the legislature has said so the conviction may be right, but language which compels or permits the conviction of an innocent person for the criminal act or default of another ought to be plain, and the intention of the legislature clear beyond a peradventure. I regard this question as one of such importance that I may be excused for quoting the following passage from the judgment of Cave, J., in the recent case of *Chisholm v. Doulton*, 22 Q. B. D. 736, at p. 740 :

“It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind * * something of that kind which is designated by the expression *mens rea*. Moreover it is a principle of our criminal law that the condition of mind of the servant is not to be imputed to the master. * * And this principle of the criminal law applies also to statutory offences with this difference, that it is in the power of the legislature, if it so pleases, to enact, and in some cases it has enacted, that a man may be convicted and punished for an offence although there was no blameworthy condition of mind about him; but inasmuch as to do so is contrary to the general principle of the law it lies on those who assert that the legislature has so enacted to make it out convincingly by the language of the statute; for we ought not lightly to presume that the legislature intended that A. should be punished for the fault of B.”

We must therefore pay strict attention to the terms of section 112, having regard also to some other provisions of the Act, and endeavour to ascertain whether they can by

any fair intendment be taken to extend to an infringement of section 130. Judgment.

OSLER,
J.A.

The first part or sub-section of section 112 enacts that the occupant of any house, shop, room, or other place in which any sale, barter, or traffic of liquor, "or any matter, act, or thing in contravention of any of the provisions of the Act" has taken place, shall be personally liable to the penalty and punishments prescribed in sections 70 and 71 of the Act, as the case may be, notwithstanding such sale, barter, or traffic be made by some other person who cannot be proved to have so acted under or by the directions of such occupant, and proof of the fact of such sale, barter, or traffic, or other act, matter, or thing by any person in the employ of such occupant, etc., shall be conclusive evidence that such sale, barter, or traffic, or other act, matter, or thing took place with the authority or by the direction of such occupant.

The 2nd sub-section enacts that the person actually selling (saying nothing of barter or traffic) or otherwise contravening any of the provisions of the Act as in this section mentioned, is styled the "actual offender," and shall be personally liable as well as the occupant to the penalties and punishments prescribed by sections 70 and 71, and may be prosecuted jointly with or separately from the occupant, but both of them shall not be convicted of the same offence.

The question is whether section 112 should be construed as being limited to making the tavern keeper or occupant liable for the act of his servant in cases only of offences against sections 54 (1), and 70 of the Act, though the latter may be the actual offender; or, whether it should be extended so as to make him liable for the act of his servant in all cases.

The prosecutor relies upon the words "or any matter, act, or thing in contravention of any of the provisions of the Act" as extending section 112 to an offence committed by the servant under section 130; but I am of opinion that notwithstanding the generality of these terms they

Judgment.

OSLER,
J.A.

are restricted by the rule of *ejusdem generis*, and controlled by other parts of the section, which is properly to be understood and construed as limited to infractions of sections 54 (1) and 70 of the Act; section 70, as I have said, prescribing the penalties for selling without a license, and section 71 those for selling during unlawful hours, contrary to the provisions of section 54 (1). The words "as the case may be," *reddendo singulae singulis*, followed as they are by the restrictive expression "notwithstanding such sale, barter, or traffic,"—not adding any act, matter, or thing,—“be made,”—not adding or done—“by some other person,” are strong to shew that these two offences only are struck at. For how is the penalty to be ascertained. I mean which of the two sections 70 or 71 is to be applied to the occupant where the offence happens to be one for example coming under section 85, which prescribes the penalty for any violation of the Act for which no other punishment is expressly provided? That section prescribes quite different and lesser penalties from those mentioned in sections 70 and 71. Is the actual offender to be liable to the lesser penalty and his master to the higher? The *reductio ad absurdum* is destructive of the argument in favour of the generality of the section.

It is true that for this particular offence the penalty to be imposed upon the offender by section 130 happens to be that prescribed by section 70, but this is a mere accident, for the question is whether the master, who is not the real offender, can be reached under section 112, and it is not because of anything said in section 130 that section 70 is applicable to the master's case.

There are many sections which shew that section 112 cannot have the extensive application contended for. Its object is, in the cases which it does provide for, which are those of the two great offences against the Act, to make the master responsible for the act of his servant, and it fixes the penalty for those offences upon the actual offender and his master, making both liable to be prosecuted, though but one of them, and that at the option of the prosecutor, can be convicted.

A construction of the Act which would make the most trifling contravention of any of its provisions punishable with the extreme penalty imposed for its most notable infraction is not to be adopted unless the terms of the section imperatively require it.

Judgment

OBER,
J.A.

The offence might be that mentioned in section 74 which imposes a penalty of not less than \$10 nor more than \$50 for making or using or allowing to be made or used any internal communication between licensed and unlicensed premises; or it might be that mentioned in section 75 which imposes a penalty of from \$20 to \$50 for allowing any internal communication between the licensed premises, and a shop or premises in which other goods are sold. Or again it might be that provided for by section 50 which forbids any person to keep or have in any house, building, shop or place whatsoever any spirituous liquors for the purpose of selling, bartering or trading therein unless duly licensed, an offence punishable under section 85, no other punishment being prescribed. Or again it might be the offence mentioned in section 79 which [as amended by 53 Vic. ch. 56, sec. 9 (O.)], provides that any keeper of any inn, etc., who sanctions or allows gambling or riotous conduct therein shall be liable to the penalties of section 85. Formerly the penalties for the infraction of this section were those mentioned in section 70, just as section 130 provides in the case of offences against that section. Yet I apprehend that neither in its original or its amended form could the occupant be made liable under section 112. Sections 72 and 76 may also be referred to.

In all these cases there may be acts, matters or things done in the tavern in contravention of the provisions of the Act to which it is impossible to say that section 112 can apply, notwithstanding the general terms which are occasionally found therein.

To these terms must be applied the rule of *ejusdem generis*, even if we confine ourselves to the section alone, but the argument in favour of that construction is unanswerable when the other penal clauses of the Act are examined.

Judgment.

OSLER,
J. A.

In my opinion the judgment quashing the conviction was right, and the appeal should be dismissed with costs.

*The Court being equally divided,
the appeal was dismissed with costs.*

WEEGAR V. THE GRAND TRUNK RAILWAY COMPANY OF
CANADA.

Negligence—Railways—Evidence.

THIS was an appeal by the defendants from the judgment of the Common Pleas Division, reported 23 O. R. 436, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 2nd of June, 1893.

McCarthy, Q. C., for the appellants.

W. R. Smyth, for the respondent.

June 21st, 1893. The appeal was dismissed with costs, BURTON, J. A., dissenting on the ground that the plaintiff was not acting under the orders of the person in charge of the shunting engine.

IN RE OLVER AND THE CITY OF OTTAWA.

Municipal Corporations — By-law—Estimates—Debt—R. S. O. ch. 184, secs. 344, 357, 359.

A municipal corporation has no power, without a by-law assented to by the electors, to enter into contracts involving expenditure not payable out of the ordinary rates of the current financial year, and resolutions for the execution of contracts for the building of a bridge, payment for which was to be made partly in the current financial year and partly in the next, were quashed as being a contravention of sections 344, 357 and 359 of the Municipal Act. Judgment of ROSE, J., affirmed.

THIS was an appeal from the judgment of ROSE, J., quashing certain resolutions passed by the council of the city on the 20th of June and 4th of July, 1891. Statement.

The purport of these resolutions was to accept certain tenders for the construction of a new bridge across the Rideau river between the city of Ottawa and the county of Carleton, and to authorize the execution of the contracts for the carrying out and performance of the work. The bridge was a work within the joint jurisdiction of the two corporations, and it had become necessary to reconstruct it or to close it altogether in consequence of its being so much out of repair as to be dangerous. The city's share of the cost of reconstruction was estimated to be about \$13,000 or \$14,000.

No provision had been made for this in the estimates for the ordinary expenditure for the year 1892. Nor had any special by-law been passed for raising the money by rate in that year, or for incurring a debt by the issue of debentures in order to pay for the work. Contracts were entered into about the 9th of August, 1891, between the two corporations and the contractor for the execution of the works, which were to be completed on or before the 15th of November, 1892.

On the 25th of August the applicant gave notice of motion to be made on the 2nd of September, 1892, to quash the resolutions in question on several grounds, of which it is necessary to notice only the two following, viz :

Statement. "That the municipal corporation of the city of Ottawa have no unappropriated money on hand to meet the expenditure necessitated by the construction of the bridge, and no provision, by rate or otherwise, has been made to raise the required amount.

"That the expenditure authorized by such resolutions being beyond the ordinary and usual expenditure and not payable within the present municipal year can only be legally authorized by by-law after receiving the assent of the electors."

At this time the only provision made by the council to meet the expenditure which might become necessary if the bridge should be rebuilt was by a resolution said to have been passed on the 5th of March, 1892, which authorized a special appropriation of \$15,000 to be granted to pay the city's share of rebuilding the bridge; "on the understanding that one-half of this amount will be charged to the general expenditure account of this year and the remainder to the appropriation for 1893."

When the motion came on to be heard it was objected that the applicant had not given the security required by section 332 of the Municipal Act, R. S. O. ch. 184, to be given "before any such motion is made or entertained," and it stood over, presumably by arrangement, in order that this defect in the proceedings might be corrected. In the meantime, on the 29th of August, 1892, the council had passed another resolution, resolving and enacting that "a sufficient sum of money out of the unexpended revenue of this year be set apart for the payment of the contractors for the city's share of the cost of the bridge according to the terms of the contracts, and that all resolutions inconsistent herewith heretofore passed by the council be repealed."

It appeared that there was on the 31st of July, 1892, at the credit of the various appropriations to which the estimates had been devoted a balance of \$65,000. That which had been made to the board of works, viz., \$25,000 had however been exceeded and overdrawn. In the esti-

mates this item appeared under the head of "street improvements, general repairs on streets, bridges, etc., snow cleaning, etc.," total \$25,000. Statement.

The motion was heard on the 9th of September, 1892, before ROSE, J., who granted the application and an order was issued quashing the resolutions in question, with a declaration that the contracts entered into consequent upon the resolutions were not binding upon the ratepayers of the city.

The city appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 10th of May, 1893.

Aylesworth, Q. C., for the appellants. It is clear that the contracts in question provided for the doing of work which it was the duty of the city and county to have done, and the work being necessary and within the scope of the powers of both corporations and the contracts for its performance having been entered into and partly performed the resolutions should not have been quashed, and certainly the contracts should not have been declared void on a summary application of this kind. The obligation to maintain the bridge in question was statutable, and the work involved necessary and ordinary expenditure, so that it was lawful for the city to proceed with the work without any by-law, and to pay therefor out of any unexpended money on hand: *In re Carpenter and Township of Barton*, 15 O. R. 55. A city council may without by-law deal in good faith with *intra vires* matters as necessity arises, and as the interest of the public demands. *Fleming v. City of Toronto*, 19 A. R. 318, does not apply to this case for there entirely new and undefined local improvement works were in question.

R. G. Code, for the respondent. The only provision for payment for the work in question was the resolution providing that half the cost was to be charged to the general expenditure for the year 1892, and the other half to the

Argument. year 1893, and therefore as the expenditure was not to be payable within the current municipal year the construction of the bridge was clearly illegal under section 344 of the Municipal Act. Moreover there were in fact no funds on hand out of which to pay for the work : *Potts v. Dunville*, 38 U. C. R. 96 ; *McMaster v. Newmarket*, 11 C. P. 398.
Aylesworth, Q. C., in reply.

June 21st, 1893. The judgment of the Court was delivered by

OSLER, J. A. :—

[The learned Judge stated the facts as above set out, and continued :]

Section 332 of the Municipal Act, R. S. O. ch. 184, enacts that any resident of a municipality, or any other person interested in a by-law, order, or resolution of the council thereof, may by motion apply to the High Court to quash the by-law, order, or resolution in whole or in part for illegality. The question is whether the resolutions which have been quashed by the order which is the subject of this appeal have been shewn to be illegal as offending against any of the provisions of the Act. They authorize the execution of a contract or contracts for the construction of a work within the authority of the corporation, which is to be completed, but not to be paid for, as the specifications shew, within the financial year.

It is clear that the expenditure which would be rendered necessary by the work was not one contemplated by or expressly provided for in the estimates for the year 1892, which were adopted and passed on the 3rd of March, and the rates required for which as regards local and school rates were imposed by several by-laws of the corporation passed on the 7th of March. Assuming that such expenditure, whether regarded as an extraordinary expenditure, or as part of the ordinary yearly expenditure of the municipality, might be considered as provided for

by, or at all events properly legal part of, the items "general repairs on streets, bridges, etc.," yet the resolution of the 5th of March shews very clearly that the cost of the work was not intended to be wholly defrayed out of that item, one-half of it only being charged thereto for the current year 1892, while the balance was to be deferred to be paid out of the corresponding item for the year 1893. It is indeed manifest that the whole could not have been added to the estimates for the ordinary expenditure of 1892, which, as I have said, were prepared without reference to this particular expenditure, without infringing upon the limit imposed upon the taxing power of this corporation ($1\frac{1}{2}$ c. in the \$ exclusive of school rates) by 41 Vic. ch. 37, sec. 12 (O.), for those estimates extend to the full limit.

The expenditure however, authorized in effect by the resolutions in question was, in my opinion, a special, extraordinary and unusual expenditure and cannot properly be described as part of the ordinary expenditure of the city. Doubtless the whole of it might have been provided for in the yearly estimates, and raised by special rate or included in the general local rate, so long as the whole was kept within the one and a-half cent limit. It was not in fact so provided for, but on the contrary a part of it was left to be raised by the council of a future year out of the rates of that year, a course which in my opinion rendered these resolutions illegal, as being directly opposed to the provisions of sections 344, 357 and 359 of the Municipal Act, since the council were thereby entering into contracts and incurring an expenditure for which they had not made provision in the estimates for the year, and were casting it in large part upon the council of a future year without the authority of a by-law passed under section 344. Thus the matter stood when the plaintiff commenced the present proceedings. I cannot see that the resolution of the 29th August mends the defendants' case. I assume that they are entitled to say that it was passed before those proceedings had become effective; but before that time the whole of the fund out of which alone the expenditure could

Judgment.

OSLER,
J.A.

Judgment. be made had disappeared, the residue of the funds in their hands being already devoted to other purposes and to the ordinary expenditure provided for by the yearly estimates.

OLIVER,
J.A.

To hold that the council could remedy the defect in the way they have attempted to do would be merely to enable them to do indirectly what they have no power to do directly, viz., to throw the cost of carrying out the lawful purposes of the municipality for one year which have been provided for by the estimates of that year upon the council of a succeeding year. I am therefore of opinion that the order of my brother Rose, so far as it directs the resolutions to be quashed, is right. The order, however, goes on to declare that the contracts entered into consequent thereon are not binding upon the corporation. This declaration must, I think, have been inserted *per incuriam* in drawing up the order, following up the terms of the notice of motion, for I am sure my learned brother could hardly have intended to deal directly with the contracts in the absence of the other parties thereto. The order must therefore be varied, and the appeal to this extent allowed. Under the circumstances it is evident that the more convenient and proper course to have taken would have been by an action in which the rights of all parties concerned might have been considered instead of by a summary application to quash the resolutions, though no doubt the latter course is expressly authorized by the statute.

There should be no costs of the appeal.

I must add that in my opinion there was no such delay in making the application as to warrant the Court in exercising any discretion to refuse the application, and also that Oliver must be treated as being, what he in fact is, the real applicant. I refer to *Scott v. Peterborough*, 19 U. C. R. 469; *McMaster v. Newmarket*, 11 C. P. 398; *Gross v. Ottawa*, 23 U. C. R. 288; *Potts v. Dunville*, 38 U. C. R. 96; *Wentworth v. Hamilton*, 34 U. C. R. 585.

Appeal dismissed without costs.

PURCELL V. BERGIN.

Will—Revocation—Revival by Codicil—Void Legacies—R. S. O. ch. 109 sec. 24.

The testator made a will on the 14th of May, 1890, disposing of all his estate, giving to certain charities specific proportions of the residue and naming three persons executors. In January, 1891, he made another will revoking all previous wills and making a number of specific devises and bequests, but leaving a large residue undisposed of. In March, 1891, he executed a codicil in which after stating that "I will and devise that the following be taken as a codicil to my will of the 14th day of May, 1890," he revoked the appointment of one of the named executors in that will "to be one of the executors of this my will" and in his stead appointed another person "with all the powers and duties * * * in my said will declared." The attestation clause stated that this was signed, etc. by the testator "as a codicil to his last will and testament":—

Held, [HAGARTY, C. J. O., dissenting], affirming the judgment of ROBERTSON, J., that there was shewn in this codicil an intention to revive the revoked will within the meaning of section 24 of the Wills Act, R. S. O. ch. 109:—

But *held* further, reversing the judgment of ROBERTSON, J., that the will so revived took effect as at the date of the codicil and that for the purpose of deciding as to the validity of the charitable bequests it must be treated as if executed at that date.

Holmes v. Murray, 13 O. R. 756, and cases of that class, where the codicil in question refers to an existing will, distinguished.

Certain of the charitable bequests having therefore been held void it was further held that those that were good were not increased, but that the amount of the void bequests was distributable as in case of intestacy.

A legacy invalid because of the legatee's husband being a witness to the will was held validated by a reviving codicil witnessed by independent persons.

THIS was an appeal from the judgment of ROBERTSON, J. Statement.

The action was brought by the executors named in a will of Patrick Purcell, dated the 10th of January, 1891, and by his next of kin, to have it declared that that will was the last will of the testator, and that a former will, dated the 14th of May, 1890, was absolutely revoked.

No question arose as to the due execution of the will of the 14th of May, 1890. By it the testator appointed Alexander Leclair, Angus McDonnell, and James Stuart, who was then his bookkeeper, his executors and he devised all his property real and personal to them upon the trusts set forth in the will. After a number of specific bequests, several of them having a proviso added, "should he survive me," "if alive at the time of my death,"

Statement. "should she be alive at the time of my death," he by the 39th clause provided that his executors should as soon as possible after his death, collect all moneys and realize all property "not specifically devised hereby; and also all the devised property which may have lapsed," and should pay thereout all money legacies, and all debts, etc., and that the residue should be divided into twenty-seven parts of which six should be paid "to the Roman Catholic Bishop of the Diocese of Alexandria, in the province of Ontario, at the time of my death, for distribution amongst the deserving poor of all denominations in the county of Glengarry, and the education of boys belonging to the said county, as he may decide according to his own discretion and not otherwise; and in the event of there being no bishop of the diocese alive at the time of my death, then that the said six parts shall be paid to the next bishop of the said diocese appointed after my death." The remaining parts of the residue were devised by the testator for various charitable purposes; four other parts to the Roman Catholic Bishop of the diocese of Alexandria, for distribution amongst the deserving poor of the town of Cornwall; four parts to the Roman Catholic Archbishop of the Archdiocese of Kingston, for distribution amongst the deserving poor of that Archdiocese; and four parts to the Roman Catholic Archbishop of the Archdiocese of Ottawa, for distribution amongst the deserving poor of the Archdiocese; the legatee and terms of the gift in each case being described in the same manner as that above set out; three parts "to the Superioresses of the convents in the said county of Glengarry, to be expended by them in the education, support and clothing of poor children; and the support and clothing of indigent men and women in the said county of Glengarry and not otherwise"; two parts to the Superioresses of the convents of the town of Cornwall; and two other parts to the Superioresses of the convents of the Archdiocese of Kingston, the gifts being in the same form and for the same purpose as that to the Superioresses of the convents

in the county of Glengarry; one other part "to the trustees of the St. Patrick's Orphan Asylum at Ottawa, for the benefit of that institution;" and one other part "to the Good Shepherd Nuns of the said city of Ottawa at the time of my death." Among the specific bequests was one to a Mrs. Cameron, whose husband was, however, one of the witnesses to the will. Statement.

Shortly after the execution of this will the testator caused it to be deposited in the office of the Surrogate Court at Cornwall for safe keeping. On the 10th of January, 1891, he wrote to his legal adviser in Cornwall, asking him to get the will and bring it to him at Glengarry. His legal adviser got the will and took it to the testator, who then asked him his opinion as to the charitable bequests. His legal adviser stated that in his opinion the bequests would to a great extent fail, and after a long discussion, a new will was drawn and executed, and was taken by the testator's legal adviser to Cornwall and left in the Surrogate Office.

By this will of the 10th of January, 1891, the testator revoked all former wills, and he appointed James Leclair, Angus McDonnell, and D. B. MacLennan, executors. In it the testator devised all his property to his executors "on the trusts following," and he then proceeded to make specific devises to his wife and a number of relatives. He then directed that his executors should collect and realize his estate, and pay all legacies, debts, etc., and he then gave specific sums of money to the Bishop of the diocese of Alexandria, and to a number of the persons to whom the gifts of the residue had been made in the previous will, with a provision that these bequests should be paid out of his pure personalty. No question arose as to the due execution of this will, but a large residue was left undisposed of, and it was proved that after getting to the end of the charitable bequests the testator was asked by his legal adviser what he intended to do with the residue, and that he answered: "I will do nothing with it." It was also proved that about Christmas, 1890, the

Statement. testator had consulted his medical adviser, Dr. Bergin, about his affairs, and on the 10th of January, 1891, the same day that the second will was executed, Dr. Bergin received a telegram from the testator asking him to come and see him immediately on business. Dr. Bergin saw the testator on the morning of the 10th of January, but no discussion took place as to business. The doctor saw him again the next day, and the testator then produced the will of the 14th of May, 1890, and asked Dr. Bergin to take it to Mr. John Bergin, a barrister, and to get his opinion as to the charitable bequests, nothing being said by the testator as to the visit of his legal adviser on the previous day, or as to the execution of the other will. Mr. Bergin's opinion was obtained, and after that a further opinion was obtained from other counsel, both being to the same effect, and adverse to the validity of the charitable bequests; but in view of the statements made by Dr. Bergin as to the testator's health counsel advised that it would be well to allow the will of the 14th of May, 1890, to stand in the meantime. Dr. Bergin returned to the testator the will of the 14th of May, 1890, with the opinions, and suggested that a new executor should be substituted for Stuart, with whom the testator had had a disagreement. The testator then instructed Dr. Bergin to take the will to Mr. John Bergin, and to ask him if he would act as an executor in the place of Stuart, and if he consented then to have a codicil prepared revoking the appointment of Stuart, and appointing Mr. John Bergin executor.

Mr. Bergin consented to act and the following codicil was then prepared, and was duly executed by the testator; nothing all this time having been said by him about the will of January, 1891:

"I will and devise that the following be taken as a codicil to my will of the 14th day of May, 1890, A.D.

I hereby revoke the appointment of Jas. A. Stuart my late bookkeeper to be one of the executors of this my will, and in his place and stead I appoint John Bergin of the

town of Cornwall, barrister-at-law, with all the powers and duties heretofore conferred upon the said Jas. A. Stuart as in my said will declared. Statement.

In witness whereof I have hereunto set my hand this 16th day of March, 1891, A.D.

(Signed) P. PURCELL.

Signed, sealed and published and delivered by Patrick Purcell as a codicil to his last will and testament who in his presence at his request and in the presence of each other have hereunto affixed our names as witnesses.

(Signed) GEORGE MILDEN.

(Signed) R. FLANAGAN."

After this codicil was executed, it was handed by the testator to Dr. Bergin, with instructions to take it to Mr. John Bergin to be attached to the will of May, 1890, and this was done.

The testator died on the 1st of May, 1891, and left him surviving his widow, two brothers, and several sisters. His estate was of the estimated value of \$550,000.00; about \$50,000.00 of this amount being pure personalty.

The action was tried at Cornwall and Toronto, on the 18th and 19th of April, and 20th, 21st, and 26th of May, 1892, before ROBERTSON, J., who afterwards gave judgment declaring that "the effect of the execution of the codicil of the 16th of March, 1891, was to revive the will of the 14th of May, 1890, as of the date of that will," and that it and the codicil were together the last will of the testator and should be admitted to probate, and declarations were made as to several bequests.

The plaintiffs appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 28th, 29th, and 30th of March, 1893.

Moss, Q. C., Hoyles, Q. C., and Leitch, Q. C., for the appellants. The will of May, 1890, was admittedly revoked by the will of January, 1891, but the learned Judge has held that it was revived by the codicil of March, 1891,

Argument. and in this we submit he was in error. The point is governed by section 24 of the Wills Act, R. S. O. ch. 109, and under that section the intention to revive must appear. Before the Act, the mere execution of a codicil referring to a will was sufficient to effect revival, but under the Act much more is required. There must not only be a reference to the will that is to be revived, but also a direct expression of intention to revive, or else a disposition of property inconsistent with any other inference, or else expressions shewing with reasonable certainty such an intention: *In the Goods of Steele*, L. R. 1 P. & D. 575; and in that case it is pointed out that the Court will strive to avoid the revival of an earlier will if thereby a later will would be cut out. See also *In the Goods of Dennis*, [1891] P. 326; *In the Goods of Turner*, 64 L. T. N. S. 805; *In the Goods of Anderson*, 39 L. J. P. 55; *McLeod v. McNab*, [1891] A. C. 471; *In the Goods of Gordon*, [1892] P. 228. In several of these cases the facility of error in dates is referred to. The mere mention of a previous will by date is not enough to effect a revival of it; there must be something more than that to effect the revival of the revoked instrument, and here there is nothing to shew the necessary intention. Even if, however, the learned Judge was right in holding that the will of May, 1890, has been revived, still he was wrong in holding that it takes effect from its own date and not from the date of the codicil: R. S. O. ch. 109, sec. 7. The first will was absolutely gone and the execution of the codicil, if it is anything, is an execution of a new will on that date in the terms of the old will of May, 1890; that is, it is simply a short way of adopting the provisions set out in the first paper, but the testamentary act that must be relied on as a compliance with the provisions of the statute is the execution in March, 1891. It has been held that the first will was never really revoked, because the second will which revoked it did not take effect until the testator's death when the third will or codicil had been duly executed, so that the revocation was itself revoked.

But this argument disregards the provisions of the Act, and clearly the revocation was absolute as soon as the will of January, 1891, was duly executed. It has also been argued that because the first will was not physically destroyed its revival took effect as of its original date, but this is altogether a fallacious argument. Its nondestruction is no evidence of the time from which the revival is to take effect. Then it has also been strongly urged that to prevent the testator's charitable intentions from being frustrated the date of the codicil should be disregarded. This, however, is a matter of construction and not of probate, and the cases cited, such as *Willet v. Sandford*, 1 Ves. Sr. 178, are cases of confirmatory codicils, not cases where a revoked will has been revived. Where there is revival the whole will is brought down to the later date: *In re Earl's Trust*, 4 K. & J. 673; *Doe dem. York v. Walker*, 12 M. & W. 591; *Skinner v. Ogle*, 4 Notes of Cases, 74. *Holmes v. Murray*, 13 O. R. 756, is distinguishable on this ground.

[The learned counsel then proceeded to consider the different charitable bequests, arguing that they were invalid under the Mortmain Act. They also argued that the bequest to Mrs. Cameron was not validated by the execution of the codicil in the presence of independent witnesses.]

S. H. Blake, Q. C., for the respondent Bergin. The evidence clearly shows that the execution of the codicil in question was the deliberate act of a man acting upon the advice of counsel, and fully understanding that such codicil was designed to keep alive the will of May, 1890, as he was advised should be done, and the testamentary capacity of the testator at the date of the codicil is not even questioned. There is no such ambiguity in the codicil as would bring it within such authorities as *In the Goods of Steele*, L. R. 1 P. & D. 575, and other cases cited by the appellants. The reference to the will of May 14th, 1890, is clear and unmistakable, and in itself shows an intention to revive that will: *In the Goods of Reynolds*, L. R. 3 P. & D.

Argument. 35; *In the Goods of Atkinson*, 8 P. D. 165; *In the Goods of Van Cutsem*, 63 L. T. N. S. 252; *In the Goods of Stedham*, 6 P. D. 205; *In the Goods of Dyke*, 6 P. D. 207; and the change of executor is cogent evidence of the same intention. The evidence of the determination on the part of the testator to carry out his charitable purposes is most important also in deciding as to his intention in executing the codicil, and in considering its effect: *McLeod v. McNab*, [1891] A. C. 471; *Jenner v. Ffinch*, 5 P. D. 106. By no possibility can the codicil refer to the will of January, 1891; the inconsistencies are too obvious: *Newton v. Newton*, 12 Ir. Ch. 118; *Hale v. Tokelove*, 2 Robertson 318. The two wills cannot stand together. Their provisions are entirely inconsistent. The will of May, 1890, exhausts the testator's estate, while that of January, 1891, leaves a very large residue undisposed of. No express words of revocation of an intervening will are necessary in a codicil to a prior inconsistent will: R. S. O. ch. 109, sec. 22; *Jenner v. Ffinch*, 5 P. D. at p. 111; *Newton v. Newton*, 12 Ir. Ch. at p. 127; *In the Goods of Chapman*, 1 Robertson 1; *Hale v. Tokelove*, 2 Robertson 318. The will of May, 1890, has been rightly held to take effect as of its own date for the purposes of the questions arising under the Statutes of Mortmain. A confirmatory codicil does not necessarily make a will operate for all purposes as if first made at the date of the codicil: *Hopwood v. Hopwood*, 7 H. L. C. 728, at p. 740; *Stillwell v. Mellersh*, 20 L. J. Ch. 356; *Holmes v. Murray*, 13 O. R. 756; *Willet v. Sandford*, 1 Ves. Sr. 178. Having, as a Court of Probate, upon the evidence found that the will of May, 1890, and the codicil of March, 1891, constitute the last and only existing testamentary disposition of the testator, in dealing with the question of the date as of which the will is to take effect, the Court, as a court of construction, cannot look at evidence dehors the will, and cannot take into account any fact, such as the existence of an intervening revoking will, which can only be shewn by such extrinsic evidence, but must treat the case as if no other documents

than the will of May, 1890, and the codicil were before it: *Argument. In the Goods of Merritt*, 1 Sw. & T. 112, at p. 117; *Methuen v. Methuen*, 2 Phillimore 416, at p. 426.

Foy, Q. C., J. A. Macdonnell, Q. C., Arnoldi, Q. C., F. R. Latchford, F. A. Anglin, and F. G. Minty, for various legatees.

Moss, Q. C., in reply.

June 21st, 1893. HAGARTY, C. J. O. :—

The law as stated by Lord Penzance in *In the Goods of Steele*, L. R. 1 P. & D. 575, shews the change made by the Wills Act in the rule of construction as to revival of a will.

It seems prior to that Act to have been held sufficient to revive a will by a codicil referring to it by date or otherwise identifying it. By the Act no will which shall be in any manner revoked shall be revived by a codicil unless it be a codicil duly executed and "shewing an intention to revive the same."

Lord Penzance's judgment in *In the Goods of Steele* fully states the law, and ten years later in the Privy Council in *McLeod v. McNab*, [1891] A. C. 471, Lord Hannen states that the exposition of the law in that case has been acted upon ever since. Lord Penzance says as to the new words as to intention (p. 578): "The legislature meant that the intention of which it speaks should appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property, inconsistent with any other intention, or by some other expressions conveying to the mind of the Court, with reasonable certainty, the existence of the intention in question. In other words, I conceive it was designed by the statute to do away with the revival of wills by mere implication."

He adds that otherwise it was quite useless to have added these words as to intention, unless something different to the old law was meant, "for every codicil to a

Judgment.

HAGARTY,
C.J.O.

revoked will, by force of being a codicil to such will, so shewed it." And he quotes approvingly the words of Sir C. Cresswell, in *Marsh v. Marsh*, 1 Sw. & T. at p. 533: "It appears to have been the object of the legislature to put an end equally to implied revocations and implied revivals."

We may assume it to be clear now that a mere reference in a codicil to a revoked will by date will not by itself be a revival under the statute.

It is strongly urged that the substitution of a new executor, instead of one named in the will of 1890, is sufficient.

In the will of 1890, he had appointed Leclair, McDonnell and Stuart his executors.

In the will of January, 1891, revoking all former wills, he named Mr. Maclellan as executor with Leclair and McDonnell.

It is therefore pressed that in cancelling the appointment of Stuart and appointing Bergin with the original two others, he was shewing the required intention.

[The learned Chief Justice read the codicil and continued:]

Granted that the mere reference to the revoked will by date is insufficient, does this substitution of executors make it sufficient?

On its face the whole apparent purpose of the codicil is to name another person instead of Stuart as executor.

It is drawn by a person ignorant of the fact that the testator had revoked the will of 1890, and who assumed that to be his last and only will.

The testator says in effect, "I made a will on the 14th May, 1890, and I make this as a codicil to it.

I then appointed Stuart one of my executors; I revoke that and appoint Bergin in his stead with the same powers."

There is no other provision—no attempt to make any fresh disposition of property—no word of confirming or ratifying the will.

Lord Penzance's words are worthy of notice: "It may in the outset be doubted whether any testator who bore in mind that he had revoked his will and substituted another

for it, can really sit down with the purpose of revoking his last will and reviving the former one, and set about the execution of that purpose by simply making a codicil referring by date to his first will without more. Would any lawyer advise such a course, or would any unskilled testator imagine he could achieve the end by such a method? The leading ideas of revoking the one and reviving the other in its place would surely find expression by some form of words in a paper designed mainly for such object. On the other hand, I conceive that in the vast majority of cases where a man declares his intention that a particular paper varying his previous disposition shall be taken as a codicil to his 'last will and testament,' he means that which really is his last will and testament, his then existing will and the disposition of his property then in force. In like manner when he goes on to declare in the common language of codicils, that 'in all other respects he ratifies and confirms his last will and testament,' he really means to confirm that which exists, and not to bring to life a paper which has ceased to be testamentary, to revive dispositions which have no existence, and are therefore not properly speaking capable of being ratified."

As already said the gentleman who drew this codicil knew nothing of the late revoking will.

Granted, as all parties grant, that the testator was fully competent to make a will, it seems wholly impossible to believe that when he signed the codicil he was not aware that he had executed the will drawn by his solicitor Maclellan two months before.

In fact he had practically arranged with Dr. Bergin, either the day or the day after the date of the Maclellan will, as to taking the best legal advice as to his charitable bequests, and a week or two before the execution of the Maclellan will, he told Bergin he had written to his solicitor Maclellan to bring down the first will to him, and on the 12th of January, two days after the date of the revoking will, and after seeing Dr. Bergin, the testator informed Maclellan that he wished to renew the bequest to the Bishop of Alexandria.

Judgment.

HAGARTY,
C.J.O.

Judgment.

HAGARTY,
C.J.O.

Dr. Bergin suggested to him not to retain Stuart as executor, and he said he intended to put another in his place. But for the change as to Stuart there was no reason whatever for the codicil. If the idea of reviving a will already revoked was present to the mind either of the testator or Dr. Bergin or the drawer of the codicil, it seems almost incredible that some customary words indicative of such intention had not been used.

The judgment of Sir C. Cresswell in *Rogers v. Goodenough*, 2 Sw. & T. 342, may be referred to. In speaking of a codicil which referred to a will by date which had been specially revoked by a subsequent will, and destroyed, he says: "It only shews an unexecuted intention to revive the former will. I am not aware that such an unexecuted intention could by any possibility have the effect of revoking the second will." See also *In the Goods of Turner*, 64 L. T. N. S. 805.

It may be said in the present case that all that appears in the codicil is a substitution of one executor for another in the will referred to by date, which had been already formally revoked.

It is a very serious proposition that the bare and meagre language here used should be held to set up the revoked will.

I cannot believe that we can hold the existing law to be complied with by anything before us in evidence.

A case of *McLeod v. McNab*, [1891] A. C. 471, in the Privy Council, was cited, and it notices the substitution of an executor for one mentioned in the codicil sought to be incorporated with the original will. It is an appeal from Nova Scotia. The facts are very fully set out in 23 Nova Scotia Reports 154, but are so widely different from those in the present case as to be no guide.

I am of opinion that the will of 1890 is not revived. It is difficult to explain the conduct of the testator. There has been no suggestion against the validity of the MacLennan will, and I think it must stand. There is no latent ambiguity which would allow explanation of surrounding circumstances of mistake on the testator's part.

Under the very extraordinary circumstances of the case I see no safe ground on which we can avoid taking the documents in their ordinary legal sense, so far, and so far only, as they explain themselves. We have a will formally revoked by a subsequent unimpeached will, by which the testator, after full notice thereof from his legal adviser, chose to die intestate as to his large real estate.

Judgment.

HAGARTY,
C.J.O.

I must hold the codicil to be insufficient to affect the second will.

I think the very wholesome provision of the Wills Act as to expressed intention should not be held satisfied by this codicil, and that the facts before us illustrate the wisdom of the change in the law and the necessity of adhering to its provision, and of not making implication equivalent to expression.

If the revoked will of 1890 is to be held revived then from what period is it to speak?

Our statute, after providing that all the sections after section 7 shall not extend to wills made before the 1st of January, 1874, adds in the same section: "But every will re-executed or republished, or revived by any codicil, shall, for the purposes of the said sections, be deemed to have been made at the time at which the same was so re-executed, republished, or revived."

I cannot see how the will specially revoked, and of no legal effect whatever by such revocation, can possibly have any effect except from the date of the alleged revival.

The case is not embarrassed by any clashing provisions or new dispositions of property, as in some of the cases cited, where the Court has striven to prevent an evident expressed intention of a testator to be defeated.

Hopwood v. Hopwood, 7 H. L. C. 728, and *Doe Biddulph v. Hole*, 15 Q. B. 848, may be referred to. So our own case of *Holmes v. Murray*, 13 O. R. 756, where the Chancery Division preserved a charitable bequest in a will executed two years before death from being defeated by a codicil executed within six months of death, specially confirming the will, but not dealing with the charitable bequest. See also *Doe Baker v. Clark*, 7 U. C. R. 44.

Judgment.

HAGARTY,
C.J.O.

I am of opinion that the first will, if set up by the codicil, must be held to speak from the date of its alleged revival.

If I might venture on a conjecture as to what was passing in the testator's mind, I would say that for some reason or other he did not wish to disclose the fact of the existence of the Maclellan will to the Bergins; that speaking of course in reference to the only will of which they were cognizant, it was suggested to him that Stuart, who had offended, should not continue an executor; that in his confused mind, having heard so much of the doubts as to charitable bequests and suggestions as to keeping alive the first will, he thought he would have, as it were, "two strings to his bow," and keep them both in existence; but that his mind was not brought to the point of revoking or annulling the Maclellan will, and he did not really mean to do so.

But for the suggestion as to Stuart, probably the codicil would never have been signed.

BURTON, J. A. :—

In this action, instituted for the purpose of deciding which of two wills was entitled to probate, the learned Judge has in addition taken the somewhat unusual course of proceeding to construe the will which he has declared entitled to probate. It appears to me that this course is open to serious objection, as it may be that eventually that may be decided not to be the last will, and the discussion which has taken place in the Court below and in this Court at very great length may be found to have been thrown away.

If I am right in the conclusion I have arrived at in this case it will be so here.

The principal question is whether a will which has been expressly revoked, and another will substituted has or has not been revived by the operation of a codicil to which I shall presently refer.

The testator on the 14th of May, 1890, executed a will prepared by Mr. O'Gara, a solicitor practising in Ottawa, and which for convenience has been referred to in argument as the O'Gara will.

Judgment.
BURTON,
J.A.

The will contained a large number of bequests to charitable uses not payable out of pure personalty, and the estate of the testator, although large, was composed chiefly of real estate and mortgages on real estate. The testator evidently had doubts of the validity of these bequests and consulted several professional men on the subject, and finally consulted his usual solicitor, Mr. Maclellan, who advised him that it would be better to make them payable out of pure personalty, which necessitated a considerable reduction in the amounts. He accordingly prepared the will of the 10th of January, 1891. If the bequests under the first will were invalid, the undisposed of residue would not materially differ under the two wills; but if valid, the first will would have disposed of the whole estate, and it was argued by counsel that it could never have been the intention of the testator to die intestate in respect of so large a portion of his property as is undisposed of by the second will, and that it was quite inconsistent with the specific bequests to his wife and other members of his family, who, in that event, would be entitled to much larger sums in the distribution of the residue than are specifically given to them. I do not know that that has much bearing upon this case, although it might have been used as an argument if the capacity of the testator had been in question at the time of the execution of the second will. I think there is much to be said in favour of the view that he did not intend to die intestate as to that residue, but had it in contemplation to dispose of it in charity during his lifetime. Down to this point the facts are undisputed; but after the execution of the second will, there are many things which appear very difficult of explanation.

I should have mentioned that the first will was deposited for safe keeping in the surrogate office at Cornwall,

Judgment.
BURTON,
J.A.

and on the 10th of January, 1891, the testator wrote to Mr. Maclellan, his solicitor there, to take it out of the office and bring it to him, and on doing so, consulted him, as I have said, about the validity of the bequests to charitable purposes, and was told of the necessity in the solicitor's opinion of confining them to pure personalty. The solicitor was then told that the testator's clerk had, under his instructions, prepared a new will, dealing with legacies to members of his family and others, but wished the solicitor to complete it as to the bequests to the bishops and the other charitable purposes he contemplated, which was done, and Mr. Maclellan was then requested to deposit the new will in the surrogate office as the former one had been, and he left the old will with the testator.

It is somewhat strange that on the following day or perhaps the day next to that the testator produced the old will to Dr. Bergin, his medical attendant, and asked him to take it to his brother, a solicitor, and ask his opinion as to the validity of these same charitable bequests, and if they were void, it is said to tell him that he wished to have such a change made as would carry out his intentions.

No allusion was then made to the new will made on the 10th of January, and neither Dr. Bergin or his brother apparently ever heard of that will until after the testator's death.

Dr. Bergin says that when he handed back to the testator the will of 1890 with his brother's opinion, he also delivered a message from his brother that he should get the best legal advice in the province, which resulted in deciding to consult Mr. Blake, and the witness was asked the first time he went to Toronto to take the will with him and obtain his opinion.

The witness accordingly had an interview with Mr. Blake on the 7th of March, who advised him that it was impossible for him to give an opinion on the will until he had an opportunity of reading the charters of the corporations or persons intended to be benefited, and of ascertaining all about the estate, how much personalty, how much

reality, so as to enable him to draw a valid will; and upon learning that the testator was not likely to live six months, he advised that the will should be kept alive.

Judgment.
BUSTON,
J.A.

The advice was communicated to the testator about the 9th or 10th of March.

I should mention in this connection that when on the 12th of January, Dr. Bergin read the will of May, 1890, and saw that Stuart's name was in it he suggested its removal. This is his evidence:

"I asked Mr. Purcell when I went down there the next day whether it was wise for him to retain Stuart as one of his executors, and he said, 'No, I intended to relieve him,' and he says, 'Who am I to put in his place?' I says, 'You ought to have a good man, a business man, a man who knows something of managing estates, a prudent man and a man who will see that his brother executors do not fritter away the estate and divert it from the purposes for which you intend it.'"

Adding whether he suggested or I suggested that John Bergin should be the executor I am not positive, because he repeated it over and over again, "he is a proper man," and afterwards when I told him that John would accept it he said that he was delighted.

It seems very strange that when this suggestion was made the testator had not remembered, or if he remembered had not mentioned, that he had only a day or two before cancelled that appointment and substituted Mr. Maclellan as executor. It may perhaps be accounted for from the fact that he still had a desire to fall back upon the first will if he could obtain a satisfactory opinion that the bequests were valid, failing which he intended to act upon the last, and that if he did eventually decide to revive the first will he did not wish Stuart, with whom he had had some disagreement, to remain in it as executor.

This concealment from the Bergins and Mr. Blake of the existence of the second will has led to very curious complications.

It would seem from Dr. Bergin's evidence that, after the

Judgment.
BURTON,
J.A.

conversation of the 12th of January, no further allusion was made to the codicil until the 14th or 15th of March, at which time the deceased complained that he had not brought that codicil which he had instructed him to have prepared.

Of course in this case there can be no question that the will to which the codicil referred was the first will ; the only question is as to its effect. If it had merely revoked Stuart's appointment I should have inclined to the opinion that that would not have had the effect of revoking the last will ; it was an unnecessary, and so far as the testator was concerned with his knowledge of the other will, a strange proceeding ; but he was not a lawyer, and possibly not certain that the execution of a later will cancelled the executorship as well as revoked the bequests in the first will. The solicitor who prepared it had no knowledge of the later will, but I fancy the solution is to be sought in the fact that he was still anxious that the first will should be acted upon if he found it valid.

The codicil is dated 16th of March, 1891, and is in these words :

[The learned Judge read the codicil and continued :]

Does this codicil, in the terms of the Act of Parliament, shew an intention to revive the will to which it professes to be a codicil ?

That intention must be gathered from the words which the testator has used ; it is not because that codicil may seem to be inconsistent with his actions only a few weeks before in going to so much trouble to have a new will prepared that we are at liberty to depart from this cardinal rule ; if we do so we at once, as it has been well said, launch into a sea of difficulties not easy to fathom. When, therefore, the testator when he executed that codicil, not merely cancelled Stuart's appointment but appointed John Bergin " with all the powers and duties heretofore conferred upon the said Jas. A. Stuart as in my said will declared " it in effect declared that he devised his estates to John Bergin

in the same manner and subject to the same trusts as they had been previously devised to Stuart.

Judgment.

BURTON,
J. A.

I do not think that it requires the use of such words as "confirm" or "revive" to have the effect of reviving a will. It must, no doubt, appear on the face of the codicil that there was an intention to revive, but that intention appears to be made clear when a new trustee is appointed with all the powers and duties conferred upon his predecessor under the will. So far, therefore, I agree with the learned Judge below.

If then the language of the codicil is sufficient to revive the will, from what date does it become operative? I apprehend it can admit of no question in a case like the present where the will has been revoked, that the effect of the revival is to make the will operative from the date of the codicil. Some of the cases referred to were cases where the will had never been revoked, but some alteration was made in the codicil, which in all other respects confirmed the will. The will had always been in force and received no additional force from the confirmation. Here the will had ceased to be the will of the deceased, but became a new will as of the date of the codicil.

For the reasons mentioned in the first part of this judgment I had intended to abstain from offering any opinion as to the validity of the bequests, but as my learned brothers are stating their opinion, I may add that I agree with them and hold all the bequests to charitable uses void except that to the trustees of the Orphan Asylum at Ottawa, and that to the Good Shepherd Nuns at Ottawa.

I am also of opinion that the bequest to Mrs. Cameron is rendered valid.

The appeal in the matters above indicated should be allowed, in other respects the judgment should be affirmed.

As the difficulty has been caused by the extraordinary conduct of the testator it would be proper that the costs of all parties upon this appeal should come out of the estate.

Judgment. MACLENNAN, J. A. :—

MACLENNAN,
J.A.

I have come to the conclusion that the will of the 14th of May, 1890, was revived by the codicil of the 16th of March, 1891.

Section 24 of the Wills Act requires that in order that a codicil shall be effectual to revive a revoked will it must shew an intention to do so. The meaning of that is that we must find in the writing, construing it according to law, that such was the testator's intention. Now this codicil refers to a will of the 14th of May, 1890, and there was a will of that date, duly executed. If we read the codicil, and look at that will, there is not a word in the codicil indicating an intention to revive, not a word indicating that it needed to be revived. The will is in due legal form, signed, attested, without any tearing or other mutilation. The codicil assumes that it is a live, valid will. It speaks of it not as a revoked will, but as "my will," "this my will," and "my said will." If so, how can we hold that it shews an intention to revive? If we did not know *aliunde* that the will had been revoked, we could not gather that from the codicil, but the reverse, and if not, it follows that neither can one gather from it an intention to revive.

But then there is the rule of construction that we must look at the surrounding circumstances. In *McLeod v. McNab*, [1891] A. C. 471, Lord Hannen quoted, with approval, the language used by Sir James Wilde in *In the Goods of Steele*, L. R. 1 P. & D. 575 : "The Court ought always to receive such evidence of the surrounding circumstances as, by placing it in the position of the testator, will the better enable it to read the true sense of the words he has used." Therefore, to understand aright the meaning and effect of this codicil we must take into account the fact that the will referred to was a revoked will. In this duly attested instrument the testator calls the revoked will, the will which had ceased to be his will, *his will*. He does not say his last will, which might mean the will of 1891, and there is no room for the

suggestion that he did mean the will of 1891, or that he meant anything else than the will of 1890. It is therefore as if the codicil had said: "This is a codicil, not to my will of 1891, but to the revoked will of 1890, which I now call my will." If he had said: "The will of 1890 is my will," and nothing more, and if the paper was duly executed and attested, I am unable to see but that it would be a compliance with the Act, and would shew an intention to revive. But this codicil goes much further. He not only calls the will of 1890 his will, but he proceeds to alter it. James A. Stuart was named as an executor in that will, and he revokes his appointment, and appoints Mr. Bergin in his place and stead, and gives him "all the powers and duties heretofore conferred upon the said Jas. A. Stuart as in my said will declared."

Judgment.

MACLENNAN,
J.A.

Now, this reference to Stuart is another circumstance which, in addition to the date, leaves no doubt that it is the will of 1890 which is referred to. Stuart was appointed an executor in the first will, but not in the second. He is not even named in the second. We know, therefore, that the testator is referring to the will of 1890, and he appoints Mr. Bergin an executor of his will, and he gives him all the powers and duties which in the will of 1890 he had given to Stuart. What were these powers and duties? By that will he had given to Stuart, and the other two executors there named, all his estate, real and personal, upon certain trusts. The powers and duties, therefore, extended to his whole estate, and he now declares that Mr. Bergin is to be executor, with these same powers and duties. If the will of 1890 had never been a will at all, but an unexecuted writing, and had been referred to in the terms used in this codicil other than calling it a will, I think the authorities shew that it would thereby have become incorporated in the will as part of it, and would have to be included in the probate. See the doctrine as to the incorporation of extrinsic documents, and the authorities cited: 1 Jarman's Law of Wills, 5th ed., p. 98. If that is so, I think it follows that the reference to

Judgment. the revoked will, the change of executor, and the express
MACLENNAN, conferring upon the new executor of the powers and duties
J.A. in reference to his whole estate mentioned in that will, which
are found in this codicil, shew irresistibly an intention to
revive the revoked will; and I think that they are a compliance with the requirement of the statute.

I do not see how it is possible to get rid of the undoubted fact that the testator has, by a duly attested paper, appointed Mr. Bergin an executor of all his estate, with defined powers and duties; and if this codicil does not revive the elder will, it must itself be regarded as a new will with Mr. Bergin as sole executor. Dealing as it does with the whole estate, it revokes by implication the later will, for the powers and duties which Stuart had under the first will comprehended everything, and these are now given to Mr. Bergin.

I think, however, as between the two alternatives of a revival of the old will and treating the codicil as a new will, the proper conclusion is a revival. That best accords with both the form and substance of the instrument. It is expressed to be a codicil to the old will, that is, an addition to it, importing that it is to be a part only and not the whole of his will.

I have examined all the authorities on this point to which we have been referred, and I think this case comes within two of the alternative rules for the construction of section 24 laid down by Lord Penzance in *In the Goods of Steele*, L. R. 1 P. & D. 575. I think this codicil, bearing in mind that the will to which it indisputably refers was a revoked will, contains "expressions conveying to the mind of the Court with reasonable certainty the existence of the intention to revive," and I also think it contains "a disposition of the testator's property inconsistent with any other intention."

That case has received the approval of the Judicial Committee of the Privy Council in *McLeod v. McNab*, [1891] A. C. 471, where it is described by Lord Hannen as "an exposition of the law which has been acted upon ever

since." Lord Hannen also says in that case: "The date is an important element in the consideration, but it is not to be taken by itself; it becomes necessary to look at the context and to anything else in the document which may explain whether the intention of the testator was to confine the action of the testamentary disposition under consideration to the document of that date, or to extend it to something more."

Judgment.

MACLENNAN,
J.A.

I think, too, that the conclusion at which I have arrived is entirely in accordance with the three decisions of Lord Hannen of *In the Goods of Reynolds*, L. R. 3 P. & D. 35; *In the Goods of Stedham*, 6 P. D. 205; and *In the Goods of Dyke*, 6 P. D. 207. See also *In the Goods of Van Cutsem*, 63 L. T. N. S. 252. *In the Goods of Turner*, 64 L. T. N. S. 805, does not seem to be consistent with the other cases cited. *In the Goods of Gordon*, [1892] P. 228, was a case of consent, and *In the Goods of Anderson*, 39 L. J. P. 55, was a case of latent ambiguity, and the erroneous recital of a date.

I am, therefore, of opinion that the judgment of my brother Robertson on this point is right and ought to be affirmed.

The next question is the time at which the will is to be regarded as made. If it is the time when the will was made in the first instance some of the charitable gifts might be valid, but if it is the date of the codicil they are invalid so far as concerns interests in land.

No case precisely in point has been cited. If the will had not been a revoked will, and had merely been established by the codicil, with a change of one or more executors or trustees, *Willet v. Sandford*, 1 Ves. Sr. 178, and *Holmes v. Murray*, 13 O. R. 756, are in my opinion satisfactory decisions in favour of the view that this will might as regards the gifts for charitable purposes be regarded as made at the original date. I think, however, that the fact that this will had been revoked excludes the application of these cases. The revocation had put an end to it. It was no longer a will, it was merely a piece of paper which

Judgment. had once been a will. It had still all the external form
MACLENNAN, and appearance of a will, but that was all; it had ceased
J. A. to be of any testamentary force or value. It was not merely dormant, it was dead. In order to become a will, it had to be revived, it had to be made again. Such as it is now it was truly and legally made, not at the original date but at the date of the codicil. As a piece of writing, it was *made* at the first date, but as a will, such as it is now, it is a will made at the later date. All that is quite different in the case of a will which has never been revoked; such an instrument has been a will all the time, its testamentary character has been continuous, and when death occurs it takes effect as of its original force, with such additions and alterations as the codicil may have made. To the extent to which it has not been altered it is a will made at the original date, and so far as it has been altered it is of the later date. I think that to hold otherwise would be to defeat the plain purpose of the legislature in imposing a time limit upon such testamentary gifts of land, namely, to secure their being the result of the settled deliberate intention of the testator.

It was argued that section 7 of the Wills Act was conclusive upon the question, but I think it affords no assistance to the contention. What that clause enacts is, that "every will re-executed or republished, or revived by any codicil, shall, for the purposes of the said sections, (that is the subsequent sections of the Act), be deemed to have been made at the time at which the same was so re-executed, republished or revived." I think that means no more than this, that whenever a question arises, whether, or how far, any of those sections apply to any revived will, the will shall be regarded as a will made at the date of the codicil. The sections referred to were declared not to apply to any will made before the 1st of January, 1874, but if any such will was re-executed, republished or revived, then, with reference to the application of the sections, it was to be deemed as made at the time of such re-execution, republishing or revival. Here it is no question upon any of these sections or of their application, but upon the application of the Statutes of Mortmain.

The learned trial Judge held that inasmuch as the revocation of the will of 1890 was by another will the revocation did not become effectual until the testator's death. I am unable to agree with that construction of section 23 of the Wills Act. If that were the true construction then the mere revocation of a revoking codicil would revive the revoked will, which section 24 declares shall not be the case. The express declaration of that section is, that "no will or codicil which has been in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same."

Judgment.
MACLENNAM,
J.A.

It was decided very soon after the passing of the corresponding section of the Wills Act in England that the mere revocation of a revoking codicil would not revive a revoked will: *Major v. Williams*, 3 Curt. 432. The same thing was decided in the Privy Council, *Cutto v. Gilbert*, 9 Moo. P. C. 131, where Dr. Lushington, delivering the judgment of their Lordships, said (p. 142): "Under the Statute of Wills, 1 Vic. ch. 26, sec. 22, there can be no revival of a will revoked by the execution of another will, except by re-execution, or by a codicil duly executed," and to the same effect are *Brown v. Brown*, 8 E. & B. 886, and *Wood v. Wood*, L. R. 1 P. & D. 309.

I am, therefore, of opinion that the revived will must be regarded as a will made not on the day of its date, but at the date of the codicil.

The next question is how the charitable gifts of this will stand as under a will made at the date of the codicil, that is to say, on the 16th of March, 1891, the testator having died on the 1st of May following, so far as they concern interests in land.

The gifts to the Archbishops of Kingston and Ottawa, and to the Bishop of Alexandria, are for distribution amongst the deserving poor, and for the education and clothing of boys; and in each case it is said that this is to be done, "as he may decide according to his own discre-

Judgment. tion, and not otherwise." There is no reference to the
MACLENNAN, corporate character of the archbishops or bishop in any
J.A. of the cases. I therefore think the gifts are personal in each case, and not corporate, and that the testator intended that they should be administered according to the personal and individual judgment and discretion of the archbishops or bishop. That being so, they would have been void so far as they affected interests in land, no matter what the date had been of the making of the will.

The Bishop of Alexandria had not been incorporated at the time of the testator's death, and the bequests to him must necessarily have been personal; and if we suppose the gifts to the Archbishops of Ottawa and Kingston to have been in their corporate capacity, those prelates in that capacity were governed, the one by the Act, 46 Vic. ch. 64 (O.), and the other by the Act, 46 Vic. ch. 66 (O.). Section 3 of the first Act and section 7 of the other are identical in their terms, and declare that unless devises to the respective corporations are made at least six months before the death of the testator they shall be void. I think, therefore, that whether the gifts to the prelates are regarded as personal or corporate, they are void as regards interests in land.

I think, too, that the gifts to the Superioresses of the convents of Glengarry, Cornwall, Stormont and Kingston are also void to the same extent, that is, so far as they affect lands or interests therein. I think these gifts are personal to the ladies named for the purposes mentioned, and that none of them appear to have any right or power either in themselves or by virtue of the powers of any corporation of which they are Superioresses, to take land by devise made less than six months before death. All these gifts, therefore, fail, including that one which was held to be good by the learned Judge, namely, that to the Superioress of the Convent of the Sisters of Charity of the House of Providence, Kingston.

The other two charitable gifts, namely, that to the trustees of the Orphan Asylum at Ottawa, and that to the

Good Shepherd Nuns of Ottawa, are good, and indeed their validity, in the event of the will of 1890 being held to be revived, was not disputed before us. Judgment.
MACLENNAN,
J.A.

On the authority of *Anderson v. Anderson*, L. R. 13 Eq. 381, the correctness of which appears never to have been questioned, I think the legacy given by the will to Emily Nash, *née* Cameron, whose husband was a subscribing witness, has been rendered valid by the codicil which was duly attested by other persons.

I am, therefore, of opinion that, to the extent I have indicated, the appeal should be allowed.

OSLER, J. A. :—

I agree with the judgment just delivered by my brother MACLENNAN.

Appeal allowed with costs out of the estate.

A motion was subsequently made to vary the minutes of the certificate, when the following judgment, in which the points are sufficiently stated, was delivered by

MACLENNAN, J. A. :—

In settling the minutes of the certificate on this appeal it was suggested that at the time of his death the testator possessed interests in lands in other Provinces than Ontario, as for example in the Provinces of Quebec and Manitoba, and that the judgment ought to be confined to interests in lands situate in Ontario: See *Duncan v. Lawson*, 5 Times L. R. 402, 41 Ch. D. 394. The question was not referred to in the argument before us, nor apparently in the Court below, and there is no evidence of the existence of any such interests out of Ontario. That being so, I think it would be unusual to provide for such a contingency in the judgment. If it turns out upon the enquiry before the Master that there are such interests, the case can be dealt with as the circumstances may require according to the law of the

Judgment, particular Province, and the omission from this judgment
MACLENNAN, of any provision for such cases will work no prejudice to
J.A. any one. I therefore think there should be no alteration of the minutes in that respect.

Another objection was made to the declaration that the next of kin of the testator are entitled to the property so far as the bequests thereof have been held to be void, and it is claimed that on the authority of *Evans v. Field*, 8 L. J. Ch. 264, the legatees whose shares of the residue have been upheld are entitled to the whole. I do not agree to that contention. In that case not only was the residue divided into eleven shares, but it was provided that all such and so much of the personal estate, the trusts, bequests or dispositions whereof in the will contained should fail or become incapable of being performed should be disposed of according to the same trusts, and it was held that one of the eleven legatees having died in the lifetime of the testatrix the residue became divisible into tenths instead of elevenths. There are no such words in this will.

The clauses in question here are as follows :

" It is my will and desire that my executors shall as soon after my death as possible collect all moneys, mortgages, notes and debts due me, except what they may remit to poor or indigent persons, and realize by sale all my property not specifically devised hereby, and also all the devised property which may have lapsed, and pay thereout all the money legacies aforesaid and all my just debts and funeral and testamentary expenses, and also any sums that may be due to my wife for dower in the event of her not electing to accept the legacies aforesaid in lieu of dower, and my said executors shall dispose of the residue thereof as hereinafter mentioned.

" I devise that all the residue of all my property of every nature and kind whatsoever shall be divided by my executors into twenty-seven parts, which they shall dispose of as follows " :

Then follow the different gifts to charities.

In the previous devises and bequests the testator

frequently, indeed in nearly every case, qualifies the gift by adding the words "if alive at the time of my death." It is therefore obvious, that when he uses the expression "and also all the devised property which may have lapsed" he uses the word "lapse" in its ordinary sense of failure by reason of the death of the devisee or legatee in the testator's lifetime. That such is the ordinary meaning of the word is, I think, clear. See Wharton's Law Lexicon; 1 Jarman's Law of Wills, 5th ed., p. 307, and the Wills Act, R. S. O. ch. 109, secs. 27, 35 and 36.

Judgment.

MACLENNAN,
J.A.

That such is the meaning of the will is evident from the general scope of the clause which has been quoted; for the lapsed property is to be reckoned in the whole mass of his estate before paying any of the money legacies or even his debts and funeral expenses; and it is what is left after that that he calls his residue, and which is to be divided into twenty-seven parts. He nowhere says that if the gift of any of the twenty-seven parts fail the other devisees of these parts, or of any of them, are to take them. See 1 Jarman's Law of Wills, 5th ed., p 719.

I think, therefore, that the seventh declaration should stand with a slight variation. As it stands it assumes that what fails to pass is all personalty; it may be otherwise—there may be real estate—therefore the words "amongst the next of kin of the said testator," should be omitted.

I think, also, the last words of clause eight should be omitted; the enquiry thereby directed would apparently involve the administration of the estate.

Motion dismissed.

FRANK V. SUN LIFE ASSURANCE COMPANY OF CANADA.

Insurance—Life Insurance—Premium Notes—Non-payment—Forfeiture—Conditions.

The assured gave to the company, to cover the first annual premium payable under a policy of life assurance containing no condition as to forfeiture for non-payment of premiums, two instruments in the form of promissory notes payable at 90 days and 180 days from the date of the application, each containing a provision that if payment were not made at maturity the policy should be void. The first note was not paid at maturity, and while it was unpaid and before maturity of the second note the assured died :—

Held, HAGARTY, C.J.O., dissenting, that without any election or declaration of forfeiture on the part of the company the contract came to an end upon non-payment of the first note and was not kept alive by the currency of the other note.

McGeachie v. North American Life Assurance Co., 20 A. R. 187, and *Manufacturers' Life Insurance Co. v. Gordon*, 20 A. R. 309, applied. Judgment of STREET, J., reversed.

Statement. THIS was an appeal by the defendants from the judgment of STREET, J.

The plaintiff was the administrator of one F. D. Cox, and brought the action for payment to him, as such administrator, of the sum of \$1,000, the amount of a policy of insurance on the life of F. D. Cox issued by the defendant company on the 9th of April, 1889, by which the company covenanted to pay the sum of \$1,000 to the assured or his assigns on the 1st of April, 1914, or if he should die before that date to his legal representatives within sixty days after the receipt of notice and proof of death. This covenant was expressed to be in consideration, among other things, of the sum of \$34.55 to be to the company duly paid on the 1st of April, 1889, as a premium for twelve calendar months, and of the payment of a like amount on the first day of April next, and yearly thereafter on the same date in every year during the continuance of the policy or until twenty-five full premiums should have been paid. The policy contained no special provisions for forfeiture. The application for the insurance was made on the 28th of March, 1889. The applicant made no payment on account of the premium, but at the time of

making the application he signed and gave to the agent of the company two instruments much in the form of promissory notes by which he agreed to pay to the agent or his order the sum of \$17.28 on the 29th of June, 1889, and the further sum of \$17.28 on the 27th of September, 1889, if the proposal for insurance should be accepted by the company, and each of these instruments or notes contained a provision that if it should not be paid on the day named, any policy for the insurance that might in the meantime be issued by the company should be null and void, but that the note should nevertheless be paid. The payment that fell due on the 29th of June, 1889, was not made, and on the 19th of July, 1889, while it remained unpaid, Cox was killed. Statement.

The action was tried on the 4th of November, 1892, at Brantford, before STREET, J., who on the 11th of November, 1892, gave judgment for the plaintiff with costs, holding on the authority of *McGeachie v. North American Life Assurance Co.*, 22 O. R. 151, that the policy had not become *ipso facto* void upon default in payment of the note, but only voidable; and that, on the evidence, the company had not, during the lifetime of the assured, made any election to forfeit.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 11th of May, 1893.

Aylesworth, Q. C., and *E. B. Brown*, for the appellants. The learned Judge in giving judgment in favour of the plaintiff followed the case of *McGeachie v. North American Life Assurance Co.*, 22 O. R. 151. That case has, however, since the judgment was given in this case, been reversed by this Court, 20 A. R. 187, and this case is not distinguishable. The note that fell due on the 29th of June contains a distinct provision that the policy is to be null and void if the note is not paid when due, and no act or election on the part of the company was necessary in

Argument. order to enable them to take advantage of that provision.

W. S. Brewster, for the respondent. The policy and application form a complete contract, and the only contract, and the acceptance of the notes for the first premium was payment thereof, the policy and application containing no provision or stipulation that the taking of the notes was not to be payment. The stipulation in the notes that in case of default in payment the policy would be void, could not affect the complete contract contained in the policy. Moreover the premium was an annual one, and as one of the notes was not due at the time of the death of the assured it could not be said that payment had not been made. At most there was default in payment of part only, and the defendants had no right to cancel the policy until both notes became due, nor did they elect to forfeit; *Mutual Benefit Life Insurance Co. v. French*, 30 Ohio St. 240.

Aylesworth, Q. C., in reply.

June 21st, 1893. BURTON, J. A. :—

This case differs from the cases we have recently decided inasmuch as we have before us the innovation of a policy without any conditions. I do not think, however, that that circumstance can affect the result, and that we must hold that the policy had ceased to be in force before the death of the assured.

The policy professes to be in consideration of the representations contained in the application, and of the annual sum of \$34.55, to be paid on the 1st day of April in each year, commencing on the 1st April, 1889, a day then passed. This, however, is explained by the fact that accompanying the application was an agreement, inaccurately referred to as a promissory note, agreeing to pay to one Reid, an agent of the company, or his order, the said first premium by two equal instalments, one on the 29th of June, the other on the 27th of September.

The company, when accepting the risk, agreed to accept the first premium on these terms. The policy thus took effect as a binding contract, and the question is whether it was terminated before the death of the assured. But the agreement in question contained a provision signed by the applicant to the effect that if the said instalments should not be paid on those days respectively, the policy should be null and void, but that the said sums should nevertheless each be paid. Although it is usual to exact the first premium in advance, it is by no means unusual to extend the time for its payment and to receive it in half-yearly or quarterly instalments. It is true that in most policies there is an express condition that the policy shall be void in the event of default in the payment of any instalment, but I apprehend such a condition is wholly unnecessary, the punctual payment of every part of the premium being a condition precedent to the liability of the company.

Promptness in payment is of the very essence of the business of life assurance; if, therefore, any one of the quarterly instalments remain unpaid, the forfeiture is absolute, unless there is something in the contract itself to dispense with it. When no such stipulation exists, it is the well established understanding that time is material, or as it is sometimes expressed, of the essence. It has been ably expressed in other words by an eminent Judge, thus: "An essential feature of this scheme is the mathematical calculation on which the premiums and amounts assured are based—not the relation between the annual premium and the risk of assurance for life for that year. It is an entire contract for an assurance for life (or as in this case for a period of twenty-five years). * * The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount insured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced by the whole insurance."

I take it to be clear, therefore, that without any ex-

Judgment.

BURTON,
J.A.

Judgment.

**BURTON,
J.A.**

press forfeiture clause, if this premium by the terms of the policy had been payable by quarterly instalments, a default in the payment of any one of them, even for a day, would have released the company from payment, and no Court could relieve against it.

In the present case, the applicant delivered to the company this agreement, which they accepted, consenting to postpone the payment, but on the express condition that if not punctually paid in terms of that agreement it should be no payment, and why should that part of the agreement which bound the company be held to be binding and not the rest?

It is, to my mind, a confusion of terms to speak of a forfeiture in this connection; the policy was to cease to be binding if the premium was not paid; it has not been paid, or which is the same thing, an instalment has not been paid.

Nothing turns upon the alleged agreement referred to in the judgment of the learned trial Judge as to the cancellation of the policy; if necessary to consider that point, I should have agreed with him that it was never completed. I am, however, very clearly of opinion that default having been made in payment of an instalment of the premium as agreed on, the policy had ceased to be binding before the death of the assured.

The learned trial Judge followed the decision in the Queen's Bench, which has, since his judgment, been reversed in this Court. I think for the reasons I have given we must grant the appeal and dismiss the action.

OSLER, J. A. :—

The policy in this case is a policy without conditions, as that expression is generally used in reference to an insurance contract. There is no condition, stipulation, or proviso within the body of the policy, or referred to therein, expressly avoiding it if the premiums are not paid at the day named, or if a note taken for the premium is not paid

when due, nor indeed is anything said therein as to the case of a note being taken for the premium. This distinguishes it in this respect from the cases of *McGeachie v. North American Life Assurance Co.*, 20 A. R. 187, and *Manufacturers' Life Insurance Co. v. Gordon*, 20 A.R. 309, recently before us. Upon the true construction of the terms of the policy I am of opinion that it is made a condition of its coming into existence as a binding contract with the applicant and of its continuance as such that the first and successive premiums shall, as to the first be paid before it comes into force, and as the latter shall be paid at the day stipulated for payment in each successive year. We are concerned only with the first premium. Its payment is not admitted or acknowledged on the face of the policy, which though delivered to the applicant was so delivered with a notice endorsed thereon that it was not binding until the first premium was paid. The company may, however, so deal with the applicant as to shew that the risk was intended to commence before the actual payment of the first premium. They may give credit for it or accept a note or other undertaking for it payable at a future time either in satisfaction of the premium or as an extension of the time for payment.

In the case at bar I think the evidence supports the finding of the trial Judge that the company accepted as payment of the first premium the two agreements (notes as they have been called, though they are not really notes being payable only on the condition of the acceptance of the proposal by the issue of the policy) bearing date the 28th of March, 1889, one for the payment of half the premium at the expiration of ninety days, and the other for payment of the remainder at one hundred and eighty days after that date. Looking at the fact that the receipt for the premium was withheld, I should myself have been disposed to hold that there was nothing more than an extension of time. But it seems to me that it makes no difference in point of law how the transaction is looked at. Either way the company had come upon the risk, and

Judgment.

OSLER,
J.A.

Judgment
OSLER,
J.A.

agreement in the first is valid the existence of the other cannot control it. The case appears to me to be precisely the same as if there had been but one note or agreement payable by two instalments, with a clause of forfeiture for nonpayment of either.

I agree in allowing the appeal.

MACLENNAN, J. A. :—

The first question which arises is the construction of the policy. It is a covenant to pay money at the end of twenty-five years, or within sixty days after the death of the covenantee, in consideration of \$34.55 to be paid on the 1st of April, 1889, as a premium for twelve calendar months, etc., and it is a unilateral covenant contained in a deedpoll, without any obligation on the covenantee to pay the premiums. It is clear, therefore, that the payment of the premiums which are the consideration for the defendants' covenant is a condition precedent, and the plaintiff cannot recover without averring and proving that the payments were duly made, or some sufficient legal excuse for the omission: *Pordage v. Cole*, 1 Wms. Saunders, p. 551; Leake on Contracts, 3rd ed., p. 564. One of the rules of construction in such cases is, that "when a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration of the money, etc., is to be performed, no action can be maintained for the money, etc., before performance." It is true that in this case the day named for the first payment is the first of April, while the covenant itself is dated the ninth day of the same month, and therefore strict compliance with the exact language of the policy was impossible. To make the language sensible the word *first* must be rejected, and then the *payment* would have to be made in the month of April. The words are "*to be duly paid*," indicating, not a payment which had already been made, but one which was to be made in the future.

Therefore, to entitle the plaintiff to succeed he must

prove payment of the sum of \$34.55, or something equivalent to it, at latest before the end of the month of April, 1889. It is admitted that the actual money was not paid, and what the plaintiff does is to shew that before the policy issued the company received, in lieu of payment, the two papers, called "notes," dated the 28th of March, 1889. The question then arises what is the effect of that? These papers at first sight look like promissory notes, and perhaps were intended to be such; but the promise to pay being conditional upon the acceptance by the company of the proposal for insurance, it is clear that they are not negotiable promissory notes, but were agreements between the assured and the agent of the company, Mr. Reid.

Judgment.
MAULENNAN,
J.A.

The plaintiff's case is that the company accepted these agreements in lieu of payment of the first premium, and the evidence shews that they did so. They are instruments expressed to be for valuable consideration, and the company having accepted them, and delivered the policy, they became binding as agreements collateral to the policy. The effect was that the risk upon the policy attached, the company gave the assured an extension of time for payment, and the latter became bound to pay the premium at the times mentioned in the agreements. Each agreement, however, contained a provision that if payment was not made at maturity the policy should be void. Unfortunately the assured did not pay the first sum at maturity, and he was in default at the time of his death on the 19th of July. Without the agreement the plaintiff has no case, and he cannot rely upon it without being bound by all its terms, one of which, in the events which have happened, is fatal to him. I think he cannot be heard to say that the policy did not cease to operate, or that the company's liability did not cease by reason of the nonpayment of the first note, when it became due on the 29th of June.

I do not think it was necessary for the company to make any election as to whether they would treat the policy as subsisting or otherwise after default. By the very terms of the agreement the extension of time for

Judgment. payment of the premium was limited, and when that time
MACLENNAN, had expired without payment being made, the assured was
J.A. in the position of a person who had not paid the premium called for by the policy, and who had not performed the condition precedent to the company's liability. Nor am I able, with great respect, to adopt the opinion of the learned Chief Justice, that it makes any difference that at the time of the death the second agreement was still current.

It is like the case of a note payable by instalments, and default made in the first payment. I see no reason why the parties should not have agreed as they did here, that the liability of the company should come to an end on default in paying the first or any instalment, or why they should not be bound accordingly. The company was, in my opinion, under risk until the first payment became due, and if that had been paid, the risk would have continued until the day appointed for the second payment, and its continuance after that would have depended on whether it was paid or not.

For these reasons I think the company's liability came to an end on the 29th of June, and that the action should have been dismissed.

I therefore think, with great respect, that the appeal should be allowed.

HAGARTY, C. J. O. :—

The defendants insisted that the dishonour of the first note avoided the policy on the allegation that its non-payment according to its terms should have that effect. But it also provided that "this note is nevertheless to be paid."

I agree with the learned Judge that these notes must be taken to have been accepted as payment of the first premium, and that the policy had become binding. It is sought to avoid it by the condition subsequent.

The learned Judge says that he thought the defendants ought to have availed themselves of their election to forfeit on the nonpayment of the first note.

It was admitted that due notice of death and proofs were furnished, and that the amount of the two notes was tendered to defendants before action brought and refused by them.

This case is very distinguishable from *McGeachie v. North American Life Assurance Co.*, 20 A. R. 187; and also from *Manufacturers' Life Insurance Co. v. Gordon*, 20 A. R. 309, lately in this Court.

In these it was held that when the life dropped there was no existing contract as to payment of premiums which was in default.

Here we have the peculiarity that there was a current obligation not matured on a note which defendants had taken in lieu of his first year's premium. It is true that the first note had, as part of its contract, the clause that if not paid at maturity the policy would be avoided. This would, of course, be at the option of the company to act upon or not. They bargained that even if the policy were avoided they might still collect the note.

The insurance companies allowing their agents to deal in this very loose and unbusiness-like manner with the payment of premiums will always have difficulties of this kind to contend with.

They issue policies based on the acknowledged payment of the first premium, and, instead of requiring such payment as a condition to the acceptance of the risk, they allow a system of "accepting notes," payable at various times, instead of the cash; they urge that this is done in ease of insurers giving them time to make up the amount.

It may be so, but it is the usual foundation for an action when the life unexpectedly drops. I think the notes here taken must be considered as representing the premium, and so long as one or more of these be current on the dropping of the life, I think they must be held to be liable—that an existing binding contract is in existence between them and the insured. If the dishonour of the first note necessarily avoids the policy, why should the second note bind the maker to pay? There would be no consideration for pay-

Judgment.

HAGARTY,
C.J.O.

Judgment.

**HAGARTY,
C.J.O.**

ment except on the ground that the giving the second note was to support the risk up to the dishonour of the first note. I cannot hold here that the fact of the first note for part of the premium being dishonoured necessarily avoids the whole contract under the circumstances in evidence in this case. It is declared to remain a binding contract for payment so far as concerns the first note. In the *McGeachie* case there was no existing contract of any kind in force at the death.

I do not desire to go beyond the principle there laid down and apply it to this claim, and I therefore hold the defendants as still bound by the insurance.

Three days after the assured's death, Mr. Reid, the payee of the notes, notices the death and adds significantly, that his sudden call was an instance of the benefit of life insurance.

If, as now insisted, the insurance was at an end, the significance of this moralizing is much weakened in point and application.

The defendants are protected from loss and reimbursed the cash amount of the first year's premium which ought to have been paid when the policy was issued by having the amount credited in the judgment against them.

My learned brothers differ from me, and I candidly admit that I arrive at this conclusion with very considerable doubt and hesitation.

Appeal allowed with costs,

HAGARTY, C. J. O., *dissenting.*

DUNSFORD V. MICHIGAN CENTRAL RAILWAY COMPANY.

Railways—Fences—Crossings—Gates—51 Vic. ch. 29, secs. 194 to 199 (D.).

It is the duty of the railway company to make and duly maintain gates at farm crossings with proper fastenings, and the knowledge of the owner of the farm that the fastenings are insufficient, and his failure to notify the company of that fact, will not prevent him from recovering damages from the company if his cattle stray from his farm, owing to the insufficiency of the fastenings, and are killed or injured.

McMichael v. Grand Trunk R. W. Co., 12 O. R. 547, approved.

Judgment of the County Court of Elgin reversed.

THIS was an appeal by the plaintiff from the judgment Statement.
of the County Court of Elgin.

The plaintiff was a farmer residing in the township of Yarmouth, and brought the action to recover the value of two cows which had strayed from the plaintiff's farm to the track of the defendants, and had been killed by one of their trains.

The action was tried on the 17th of December, 1892, at St. Thomas, before Hughes, County Judge. The cows had made their way to the track by a crossing originally built by the defendants. Gates had been placed at the crossing by the defendants, and it was admitted that the gate fastenings were originally sufficient. It was shewn, however, that the fastening of the gate on that side from which the cows strayed had become so much loosened that the gate would open if pushed, or if shaken by the wind. But it was also shewn that the fastenings could have been made quite secure with very little trouble, and that the gate to all appearance was in good order. The plaintiff knew of the insufficiency of the fastening, but gave no notice to the defendants. It was proved that late one evening the gate was left closed and that the cows were then in the field, and that early next morning the gate was open and that the bodies of the two cows were near the track. There was no proof whatever of the manner in which the gate had been opened.

Statement. The following were the questions submitted to the jury, with their answers thereto:

Was the fastening of the gate reasonably sufficient for the purpose of keeping the gate closed when first put on, or when the plaintiff's cows were killed? When first put on we believe it was, but when the plaintiff's cows were killed it was not.

Was such fastening after it was first put on kept in a reasonable state of repair? It was not.

Did the plaintiff's cows get through the gate on the railway track by reason of the insufficient fastening or by reason of the gate having been opened by some person? The cattle got through the gate through insufficient fastenings, but how it was opened we do not know.

If the plaintiff is entitled to recover what damages is he entitled to recover? \$100.

Upon these findings the learned Judge entered judgment for the defendants, on the ground that the plaintiff should have used reasonable means to make sure of the gate remaining shut, and should have notified the defendants of the insufficiency of the fastening, and a motion by the plaintiff in term to set aside this judgment was dismissed with costs.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 16th and 17th of May, 1893.

W. J. Tremear, and J. A. Robinson, for the appellant. The judgment is clearly wrong in so far as it decides that any duty was cast upon the plaintiff to repair the fastening or to inform the defendants that the fastening was insufficient. The Railway Act casts upon the railway company the duty of providing proper gates and proper fastenings, and makes them liable for all damages resulting from want of repair or from the insufficiency of such fastenings: *McMichael v. Grand Trunk R. W. Co.*, 12 O. R. 547; *Studer v. Buffalo and Lake Huron R. W. Co.*,

25 U. C. R. 160. The findings of the jury are directly in favour of the plaintiff and should not have been ignored. Argument.

D. W. Saunders, for the respondents. It is admitted that the fastening was originally sufficient, and that the gate was to all appearance in good order. The defendants had no notice whatever of any insufficiency, and it is unreasonable to hold them liable for an accident like the present. There is no proof moreover that the accident resulted from the insufficiency of the fastening. It is quite possible that some one may have opened the gate, and the defendants should not be held responsible in the absence of some evidence as to the cause of the accident: *Young v. Hannibal, etc., R. W. Co.*, 82 Mo. 427. The negligence of the plaintiff himself was the real cause of the loss: *Weir v. Canadian Pacific R. W. Co.*, 16 A. R. 100; *Ellis v. London and South Western R. W. Co.*, 2 H. & N. 424.

W. J. Tremear, in reply.

June 21st, 1893. HAGARTY, C. J. O.:—

Mr. Symons for the defendants urged at the trial, and Mr. Saunders afterwards before us, that, especially on sections 194, 196, 198 of the Railway Act, 51 Vic. ch. 29 (D.), the plaintiff could not recover, as the law cast on him the duty of keeping the gate duly closed and fastened.

Section 196 provides that after the fences, gates, and guards have been duly made etc., and while they are duly maintained, no such liability shall accrue for any such damages, unless the same are caused wilfully or negligently by the company, etc.

Section 198 provides that the persons for whose use farm crossings are furnished shall keep the gates at each side of the railway closed, when not in use, and no person any of whose cattle are killed by any train owing to the non-observance of this section shall have any right of action against the company, etc.

Section 199 imposes a penalty on any one wilfully leaving the gate open, etc.

Judgment.

HAGARTY,
C.J.O.

The evidence failed to shew any neglect of the plaintiff or his servants in not keeping the gate closed when using the crossing or otherwise. On the contrary the cattle were shewn to have been all in the enclosed field with the gate closed when last seen at night.

It was urged to the jury that some tramp or other persons might have opened it during the night.

It seems impossible to say that all these matters were not for the jury to pass upon, and their verdict explains what they find.

On the motion in term, the learned Judge discusses the evidence of the servant, knowing that the gate was insecurely fastened and would fly open on being struck, etc., and he held that his knowledge must be held to be the knowledge of his master the plaintiff, and that as neither the plaintiff nor the servant did inform the defendants or their trackmen of the defect, the learned Judge considered that the plaintiff was thereby guilty of contributory negligence, and that but for his and his servant's co-operating fault, the gate would not have swung open, as it was proved to be liable to do when pressed against. He also held that this default of the servant was proximately that of the plaintiff himself; and that there was sufficient evidence of the contributory fault of the plaintiff proximately contributing to the opening of the gate for want of a fastening.

In substance, as we understand it, the learned Judge considered that the plaintiff, through his servant, knowing the insecure state of the fastening, should either have repaired it himself or notified the defendants thereof.

We are unable to agree with the learned Judge's view of the law or of the facts.

It may be a churlish and unneighbourly act of a landowner knowing the fastening to be unsafe for the want of some very trifling repairs, neither to make the repairs himself, nor to notify the company's servants.

But we cannot hold such conduct to be a bar to the right of recovery.

So to hold must be to introduce into the statute, which declares it to be the duty of the company to make and maintain, words to the effect that such duty does not arise until notice is given to them of the defect by a plaintiff aware of its existence.

The learned Judge had before him the case of *McMichael v. Grand Trunk R. W. Co.*, 12 O. R. 547, where the contrary is distinctly held.

We are not prepared to overrule that case. The statute throws the whole responsibility on the company.

There was no evidence to lead to the belief that the accident arose from any omission on the plaintiff's part to close the gate after using it.

In this view of the law it is not easy to see how any alleged default of the plaintiff or his servant to notify the company—a mere nonfeasance—can amount to the contributory negligence found by the learned Judge.

We think the appeal must be allowed, and judgment be entered in the Court below discharging the defendants' rule with costs and entering judgment for the plaintiff with costs for his verdict.

OSLER, J. A. :—

I think the duty which the Act of 1888, 51 Vic. ch. 29, sec. 198 (D.), imposes upon the owner to keep the gates at his farm crossing closed is in respect of his own use of them, and having regard to the character and condition of the gates and their fastenings. The company are bound not only to erect, but to maintain the fences and gates, and to give section 198 the construction which the defendants ask us to give it, would be to throw upon the owner a duty, which I am of opinion was never intended to be thrown upon him, of continuous oversight and inspection of the gates and of seeing that they are kept shut no matter what their condition. The primary duty is thrown upon the railway of maintaining the gates with proper fastenings. Where that duty is omitted, and the gate has not been left open by

Judgment.

HAGARTY,
C.J.O.

Judgment.

OSLER,
J.A.

the owner after his own use of it, the company are responsible for the destruction of his cattle on the line, where they escape upon the line in consequence of the company's default. Here the findings of the jury, upon evidence which fully warrants them, are such as to shew the company's default and the consequential damage to the plaintiff.

This exposition of the statute imposes no hardship upon the defendants, nor is it so unreasonable or opposed to common sense as seems to have been supposed. They have severed the plaintiff's land for their own interest and advantage. He is not paid compensation for looking after the condition of the gates and locks, and with the staff of section-men and labourers the company are obliged for their own purposes to employ along their line, it can be neither difficult nor inconvenient for them to take care that a frequent and systematic inspection of the condition of the gates and their fastenings is kept up, and a proper state of repair maintained without awaiting complaint or action by the owner.

The case comes within *McMichael v. Grand Trunk R. W. Co.*, 12 O. R. 547, and I see no reason for differing from the law as laid down in that case, and in the older case of *Studer v. Buffalo and Lake Huron R. W. Co.*, 25 U.C.R. 160. The case of *Ellis v. London & South-Western R. W. Co.*, 2 H. & N. 424, is quite distinguishable, for there in effect the plaintiff had agreed with the defendants that a gate with a lock on it was a proper mode of protecting his cattle, had received a key from them and lost it. Then the gate is broken down; the plaintiff takes upon himself the obligation of looking after it, and as Martin, B., says, before any obligation could arise on the part of the defendants to secure it in any other manner, notice of the loss of the key should have been given to them. We cannot here infer any such agreement or arrangement between the railway company and the landowner. The company have put up a gate with fastenings which they deemed sufficient. The plaintiff took it as it was furnished by them, and it has been allowed to get out of repair, in other words has not been maintained as the Act requires.

A case from Missouri was cited by Mr. Saunders, and I have noted several others in the reports of that State, and some in the State of New York, but we must construe the language of our own statute, and cases decided upon the statutes of another country and differently expressed are of very little service. I do not find it necessary to enter into a discussion of the law of master and servant with reference to the assumed negligence of the plaintiff's servant in omitting to inform him of the condition of the gate.

Judgment.

OSLER,
J.A.

I agree in allowing the appeal. I refer to *Davis v. Canadian Pacific R. W. Co.*, 12 A. R. 724.

MACLENNAN, J. A. :—

I agree with the judgment of the Chief Justice that the appeal should be allowed.

I think the judgment of the Queen's Bench Division in *McMichael v. Grand Trunk R. W. Co.*, 12 O. R. 547, is a proper construction of the Railway Act, and correctly defines the rights and duties of the company and the land-owner as to gates at farm crossings.

I also think there was evidence to support the findings of the jury that the accident was caused by the insufficiency of the gate fastenings.

Appeal allowed with costs.

IN RE FORBES V. MICHIGAN CENTRAL RAILWAY COMPANY.

Prohibition—Division Court—Delivery of Judgment—R. S. O. ch. 51, sec. 144.

Prohibition will lie to restrain proceedings under a judgment delivered without the notice required by section 144 of the Division Courts Act, R. S. O. ch. 51.

In re Tipling v. Cole, 21 O. R. 276, approved.

Judgment of the Queen's Bench Division, 22 O. R. 568, affirmed, MACLENNAN, J. A., dissenting.

Statement. THIS was an appeal from the judgment of the Queen's Bench Division, reported 22 O. R. 568.

The action in question was brought on the 9th of November, 1891, in the 7th Division Court of the county of Kent, to recover \$60 damages, for fences burned, as was alleged, owing to the negligence of the defendants and was, with another case involving similar issues, tried at Chatham, on the 17th of February, 1892, when judgment was reserved, no day and hour being fixed for its delivery. On the 15th of March, 1892, a written judgment in favour of the plaintiff was handed by the Division Court Judge to the agent for the plaintiff, and was by him given to the Division Court Clerk, who, on the 17th of March, entered judgment in his office. No notice of the delivery of judgment or of the entry of judgment was given to the defendants until the 10th of May, 1892, and on the 20th of May they moved for an order prohibiting the plaintiff from proceeding further.

There was contradictory evidence, which is set out in the report in the Court below, as to alleged acquiescence on the part of the defendants in the mode in which the matter had been disposed of.

The motion for prohibition was argued before ROSE, J., who, on the 22nd of June, 1892, dismissed it with costs, but on appeal his order was reversed by the Queen's Bench Divisional Court.

The plaintiff appealed, and the appeal was argued (by consent) before HAGARTY, C. J. O., OSLER, and MACLENNAN, J.J.A., on the 15th of May, 1893.

M. Wilson, Q. C., for the appellant. The defendants acquiesced in and consented to the postponement, and did not ask that any day for delivery of judgment should be named, and cannot now object. At most this is a mere irregularity in practice and procedure, and if any injury has been done to the plaintiffs they could have applied to the Judge of the Division Court for relief, and should not have made an application for prohibition. Admittedly the case was within the jurisdiction of the Judge, and this is simply an incidental question, and prohibition does not lie: *Jones v. Gittins*, 51 L. T. N. S. 599; *Barker v. Palmer*, 8 Q. B. D. 9; *In re Zohrab v. Smith*, 17 L. J. Q. B. 174; *In re McLean v. McLeod*, 5 P. R. 467; *In re Burrowes*, 18 C. P. 493; *Fee v. McIlhargey*, 9 P. R. 329; *Mayor of London v. Cox*, L. R. 2 H. L. 239.

D. W. Saunders, for the respondents. There was in fact no acquiescence in the mode of delivery of judgment, and the result will be, if the order for prohibition is not upheld, that the respondents are without any remedy at all, as it is impossible for them now to obtain an order for a new trial or any other relief. That prohibition lies when the provisions of the Division Court Act as to the mode of delivery of judgment are departed from, has been settled by a number of authorities, and assuming that the finding of the Court below against acquiescence is right, there can be no ground for setting aside the order: *In re Wilson v. Hutton*, 23 O. R. 29; *In re Bank of Ottawa v. Wade*, 21 O. R. 486; *In re McPherson v. McPhee*, 21 O. R. 411; *In re Tipling v. Cole*, 21 O. R. 276.

M. Wilson, Q. C., in reply.

June 21st, 1893. HAGARTY, C. J. O. :—

I do not see how we can interfere with the decision of the Queen's Bench Division unless the appellant can convince us that prohibition does not lie in such a case. There is no evidence that I can see of any waiver or consent either by words or conduct to dispense with the statutable

Judgment.

HAGARTY,
C.J.O.

requirement that the Judge in deferring judgment must appoint a day in writing for delivering same.

An examination of the numerous authorities cited on the argument fails to convince me that prohibition is not the proper remedy.

The statutable direction is very plain. An inferior Court is created, and its jurisdiction defined. The trial Judge is to pronounce his decision as soon as may be after hearing. If not prepared so to do he may name a subsequent day for the delivery thereof in writing at the clerk's office, etc. This I consider a wholesome and just provision.

If the parties choose to assent to his not naming a day, but that he might send his judgment to the clerk when ready, prohibition would not be granted to an assenting party, as in the case cited of *In re Bank of Ottawa v. Wade*, 21 O. R. 486.

As already stated there is no proof of any assent express or implied to the learned Judge acting as here.

For a long series of years I think our Courts have regarded this statutable prohibition as obligatory, and not as a mere matter of practice in the judgment or discretion of the Judge.

I think this appeal must be dismissed.

OSLER, J. A. :—

I think this appeal should be dismissed.

I am not prepared to take a different view on the question of waiver from that taken by the Queen's Bench Division, viz.: that it cannot properly be inferred from anything which took place when the parties were last before the Judge, that they waived the statutory requirement of fixing a day and time for giving judgment when the Judge should be ready to dispose of the case. All that can be said is, that they consented to treat the case as being under or in course of trial until that time, and then it became the Judge's duty to name the day and hour for the delivery of the judgment at the clerk's office so that the parties might be present if they

thought fit. Clearly the case is not one in which we should extend the literal terms of the consent, because if what the Judge did be held to be within it, the parties have no remedy. The judgment is in that case a valid and regular judgment. It was no part of the clerk's duty to send the parties notice that he had received the Judge's decision or that he was about to enter or had entered judgment. There was no default or error on his part. All that he had to do was to enter the judgment on receipt of the Judge's decision, and the parties were bound to take notice of it at their peril.

Judgment.

OSLER,
J.A.

Section 144 does not require him to send notice to the parties, and upon the waiver or consent which has been contended for the case would be taken out of that section altogether, and there would be no irregularity in the judgment so entered, because it would necessarily be covered by the alleged consent, and the defendants could not have attacked it otherwise than by a motion for a new trial, which they have lost the opportunity of making, the judgment not having come to their notice until long after it was too late to move against it.

Possibly if there had been anything irregular in the mode of entering the judgment, the defendants might have moved against it within a reasonable time after notice of the irregularity without reference to the prescribed limit of fourteen days, as it is held that the Judge of an inferior Court may grant a new trial for matters of irregularity, as where the proceedings have been contrary to the practice and rules of Court. See Comyn's Dig., Tit. Court (Q.), and the cases cited in the judgment of Hughes, County Judge, in *Steward v. Moore*, 9 C. L. J. 82 (1863). But if the plaintiff's contention is right, there was nothing of that sort here, and if the Judge had attempted to grant a new trial after the prescribed time on any such ground, the plaintiff would no doubt have successfully contended on the authority of *Regina v. Doty*, 13 U. C. R. 398; *Mitchell v. Mulholland*, 14 C. L. J. 55; *Bell v. Lamont*, 7 P. R. 307; *In re McLean v. McLeod*, 5 P. R. 467, that he had no jurisdiction to do so.

Judgment.

OSLER,
J.A.

The case of *In re Burrowes*, 18 C. P. 493, cannot assist the plaintiff in the least, for there a clear case of waiver was proved, which is the ground of the decision. The statute enacts that the Judge shall name the day and hour for the delivery of his judgment in writing at the clerk's office. At the close of the hearing, the Judge announced that he would deliver judgment at his Chambers at a subsequent day, but did not name the *hour*. Neither party objected to this course. Before that day he sent his written decision to the clerk of the Court, at whose office the parties attended on the day named; and the judgment was read to them by the clerk and a copy taken by the party afterwards objecting. A clearer case of waiver can hardly be conceived.

The defendant moreover had lain by and had not moved for a new trial as he might have done, if he could have shewn that he had any grounds for it, and had suffered the plaintiff to issue execution before taking any further steps.

In the present case, as I have said, there was no waiver of the statutory requirement. Then what course should the defendants have taken? According to my experience the practice, when no question of waiver has arisen, has always been that stated and followed in the recent case of *In re Tipling v. Cole*, 21 O. R. 276, viz., to move for a prohibition. Mr. Wilson, however, contends that the omission of the Judge to name a day and hour for the delivery of the judgment at the clerk's office, is a mere matter of practice or procedure in the Court below, and therefore not a ground for prohibition against further proceeding on the judgment.

If it were so, we might have to consider whether we ought now to reverse what I must call the settled practice of granting prohibition in a case of this kind. But there is much more than a mere question of procedure involved. The Court below is attempting to enforce a judgment which can only be described as a nullity. It is easy to trace the limit of its jurisdiction as regards the trial and disposition of a case of which the subject matter is within its jurisdiction.

First: the defendant is summoned to appear on a day certain named in the summons. I pass over the case where judgment is obtained by default. If the claim is disputed, section 114 then provides that in cases where a trial is to be had, the defendant shall, on the day named in the summons, appear in court to answer, and the Judge shall proceed in a summary way to try the cause and give judgment.

Judgment.

 OSLER,
J.A.

Section 117. If on the day named in the summons, the defendant does not appear or sufficiently excuse his absence, the Judge on proof of due service, etc., may proceed to the hearing or trial on the part of the plaintiff only, and the order, verdict, or judgment shall be final and absolute, and as valid as if both parties had appeared.

By section 118, the Judge, if he thinks it conducive to the ends of justice, may adjourn the hearing for the purposes specified, or for any other cause which he thinks reasonable; so also when the action is being tried by a jury, the Judge is empowered under section 119 to postpone or adjourn the trial for such time and upon such terms as he may think fit.

Then we pass on to section 144, which enacts that the Judge *shall* in any case heard before him openly in court and as soon as may be after the hearing, pronounce his decision; but, if he is not prepared to pronounce it *instantly*, he may postpone judgment and name a subsequent day and hour for the delivery thereof in writing at the clerk's office; and the clerk shall read it to the parties if present, and shall forthwith enter the judgment; "and *such* judgment shall be as effectual as if rendered in Court at the trial."

The power and jurisdiction of the inferior court to deal with a case thus coming before it, is thus plainly defined and circumscribed. It comes on for trial on the day for which the defendant has been summoned. If it is not then tried or duly adjourned, it is at an end, though the plaintiff no doubt may bring a new action. There is no power to revive it or fix a new day for the appearance of

Judgment.

OSLER,
J.A.

the defendant and the trial. Proceeding one step further, it must by section 144, if not adjourned, be disposed of on the day of trial, unless the Judge adopts the alternative given by that section, and names a subsequent day and hour for its delivery at the clerk's office, and *such* judgment shall be as effectual as if rendered in Court at the trial. Here again, if the Judge neither disposes of the case at the trial *instantly*, as the section has it, nor fixes the subsequent day and time for its delivery, the cause is equally at an end as if it had not been adjourned. There is no power to take it up again, or to give a judgment which shall be as effectual as if rendered in Court at the trial. If then a judgment is given under such circumstances in disregard of the statutory requirements, there is an absolute want of jurisdiction, and that is the ground on which prohibition has been granted in such cases. I think the legislature has intentionally prescribed the course of proceedings so that cases dealt with as Division Court cases are intended to be, in a simple and summary manner, shall, as it were, not be lost sight of, but dealt with in the presence of the parties, or at times fixed when they are present, or of which they thus have direct notice. So, too, the strict limitation of the time within which a new trial shall be granted; the infringement upon which has always been met by prohibition, is in pursuance of the same general policy of the Act.

If, as I hold, prohibition lies here, and for the reasons I have stated, it would have been futile to apply to the Judge of the Division Court; and the cases of *Barker v. Palmer*, 8 Q. B. D. 9, and *Jones v. Gittins*, 51 L. T. N. S. 599, cited by Mr. Wilson, are not in point. In the former the contention was, that the party should have applied for prohibition instead of appealing. But, as an appeal was given by the County Court Act, the objection naturally failed; the Court points out that even if prohibition would lie, the remedy by appeal took precedence of it, citing Comyn's Dig., Tit. Prohibition (D.), vol. 7, p. 140.

In *Jones v. Gittins*, the Court merely exercised their

discretion in refusing prohibition, even if it would lie, which they did not decide, in the absence of anything to shew that the party applying had brought the question, which was simply one of irregularity, before the county Judge, and had given him an opportunity of setting aside his order. Where, as in this case, the absence of jurisdiction appears I do not understand that case to decide that the party objecting is bound before applying for prohibition to go to the Court whose proceedings are objected to, and ask it to hold its hand or retrace its steps. If it does so decide it is in direct opposition to the law laid down in *Mayor of London v. Cox*, L. R. 2 H. L. 239. Here, at all events, we have to deal with a case where prohibition has been granted, and for something more than a mere irregularity.

Judgment.

OSLER,
J. A.

As the case of *Fee v. McIlhargey*, 9 P. R. 329, has been referred to, I may add that, though a decision of my own, I think it was right. But the objection there relied on was in the strictest sense as to a mere matter of practice.

The judgment of the Queen's Bench Division ought, in my opinion, to be affirmed. It is unnecessary to add that there is nothing (except possibly the delay) to prevent the plaintiff from bringing a new action if he shall be so advised.

MACLENNAN, J. A. :—

I think this appeal should be allowed. There is no doubt the learned Judge had jurisdiction over the action; that is not at all disputed. If he had proceeded regularly he had power to try the case, and to pronounce the judgment complained of. The ground of the application is that he failed to observe the rule prescribed by the statute, section 144, R. S. O. ch. 51, which requires him, when not prepared to pronounce a decision at the trial, to name a subsequent day and hour for the delivery thereof in writing at the clerk's office, to be read by the clerk to the parties. That is an important rule of procedure, intended

Judgment. to prevent surprise to the parties, and to ensure prompt
MACLENNAN, notice to them of the judgment ; but like other rules of pro-
J.A. cedure, it could be waived by the parties. The solicitors differ as to whose proposal it was that judgment should be postponed, but it is not disputed that it was so postponed without objection, and without any day or hour being named for the giving of it.

The learned Judge certifies, "that at the conclusion of the evidence, it was suggested and agreed, that the suits be not argued on that day, but that each party hand me a list of authorities on which they relied, and that I would then make out my judgments at my leisure, and hand them to the clerk, and this was done ; no time being appointed for handing me the authorities or for my giving judgment." The trial was on the 17th of February. On the 24th of February, the plaintiff's solicitors wrote to the defendants' solicitors asking them to send a list of their authorities to the Judge without delay, and naming one case on which they relied on behalf of the plaintiff. On the following day the defendants' solicitors answered the letter, enclosing a list of authorities, and saying they had, as the fact was, sent them to the Judge. There could, in my opinion, be no stronger act of waiver of the rule of procedure in question ; no clearer evidence of the agreement sworn to by the plaintiff's solicitor, and stated in the Judge's certificate, than this letter. They were content that the learned Judge should consider the authorities, and give his judgment at his leisure, and they took the chances of his judgment being in their favour. They never called the attention of the learned Judge to the rule, and never complained that it had been disregarded.

The learned Judge considered the case and prepared a judgment, dated the 15th of March. If he had sent his decision to the clerk, everything would have been in exact accordance with the agreement of the parties, and up to that point I do not see how it would have been possible for the defendants to complain. If the decision had been in their favour, they could unquestionably have

maintained it, as a regular and valid decision, subject of course to be attacked by a motion for a new trial like any other regular judgment; and if against them, it could have been maintained by the plaintiff as regular and valid to the same extent. It seems, however, that the proceedings were in the 7th Division Court of the county and that the proper place of trial was a place called Merlin; and the residence of the clerk was at another place called Fletcher, both some distance from the county town of Chatham, where by consent the trial had taken place. On the day on which the learned Judge prepared his decision, he met the plaintiff's solicitor at Chatham, and gave his decision to him to deliver or send to the clerk. The plaintiff's solicitor did so, but unfortunately neither he nor the clerk informed the defendants' solicitor of its having been given, and the latter did not learn of the judgment until long afterwards, on the 10th of May. The clerk had entered judgment on the 17th of March.

Judgment.

MACLENNAN
J.A.

Now, with great respect, I think that everything that took place down to the delivery of the decision to the clerk was perfectly valid and unobjectionable. If the decision had been attacked on that day, either by a motion for prohibition or otherwise on the ground of disregard of section 144, or for any other irregularity, in my judgment any such attack must have utterly failed; and the only thing the defendants could have done was to move for a new trial.

It was at this point that an irregularity occurred. Section 144 provides that when judgment is given after a postponement, the clerk shall read the decision to the parties or their agents, if present, and he shall forthwith enter the judgment. The clerk therefore had no authority to enter the judgment until he had read the decision to the parties, or had done what was equivalent to it. This he might have done by notifying them that it had been given, and fixing a day and hour for reading it to them at his office. If they failed to attend, he might then enter judgment, but not till then. Having entered the judgment

Judgment. without performing this duty, the entry of judgment was wholly irregular; and as soon as the defendants were informed of it, they could have moved to set it aside. I think that is what they ought to have done, and that the application for a prohibition was not the proper remedy. The signing of the judgment by the clerk was, as I think, not a mere irregularity, but a nullity; and we cannot assume that the learned Judge would have hesitated, if applied to, to remove it out of the defendants' way, so that in regular course he could apply for a new trial if advised to do so.

MACLENNAN,
J.A.

I think these conclusions are supported by the highest authority.

In *In re Burrowes*, 18 C. P. 493, the Court had a case before it very like the present, and it was held that the parties had waived the requirement of the statute that an hour as well as a day should be named for giving a postponed decision; and at p. 508, Richards, C. J., delivering the judgment of the Court, said: "Suppose, at the usual sittings of the Court, without any adjournment, the Judge had said, I will deliver a written judgment in this case on a certain day, and had omitted to say at the clerk's office, or the hour, and the parties, or their agents, on the day went to the office and the clerk read the judgment; or suppose they read it themselves, would the fact that the Judge had omitted to name the hour or to say he would deliver the writing at the clerk's office invalidate the judgment? I should think not." Now, if the naming of the hour and the place may be waived, why not also the day? I think there is no reason, and I think the waiver here was complete and took away all right to object to the decision.

It is also a general rule that prohibition does not lie for irregularity of procedure.

In *Mayor of London v. Cox*, L. R. 2 H. L. 239, at p. 276, Willes, J., says: "Where there is jurisdiction over the subject matter, prohibition will not go for mere irregularity in the proceedings;" and this passage is quoted with approval

by the present Chief Justice of Ontario, in *In re McLean v. McLeod*, 5 P. R. 467. To the same effect is *Ex parte Story*, 8 Exch. 195, the head note of which is: "Where a Court has jurisdiction over a suit, mere irregularities in the proceedings in the suit do not afford any ground for prohibition." See also *Ellis v. Watt*, 8 C. B. 614. To the same effect are *Fes v. McIlhargey*, 9 P. R. 329, a decision of my brother Osler; *In re Mitchell v. Scribner*, 20 O. R. 17; *In re McPherson v. McPhee*, 21 O. R. 280 and 411.

Judgment.

MACLENNAN,
J. A.

There are also two comparatively recent cases in England to the same effect. The first is *Barker v. Palmer*, 8 Q. B. D. 9. In that case a County Court rule required that the summons in an action should be delivered to the bailiff forty clear days at least, and should be served thirty-five clear days, before the return day thereof. The summons was delivered thirty-nine clear days, and was served thirty-eight clear days, before the return day. The County Court Judge ruled that the service was good, and tried the case, giving judgment for the plaintiff. It was held that the rule as to the time for delivering the summons to the bailiff was obligatory, and that the Judge ought not to have tried the case, but that the remedy was by appeal and not by prohibition. Lopes, J., said: "The whole question being one of procedure, it appears to me that the Judge's ruling was upon a matter of law incident to his jurisdiction, and that an appeal can therefore be brought."

The other case is *Jones v. Gittins*, 51 L. T. N. S. 599. In that case a County Court rule required seven clear days' notice of trial in writing. Notice was given on the 8th of November for the 12th, but the other side refused to receive it, as too short, and did not attend. The objection to the notice was brought to the attention of the Judge, but he granted a new trial. A motion for prohibition was made, and the Queen's Bench Division (Grove and Hawkins, JJ.) refused the application, holding that the proper course was to apply to the Judge to set aside the order as irregular, before applying for prohibition.

Judgment. I think there is no substantial difference between the last case and the present. Here the clerk was wrong in entering the judgment. It was irregular, and indeed, a nullity, for the case had not arrived at the proper stage for entering a judgment at all. Therefore, it was a proceeding which the Judge could, and if applied to, would undoubtedly have set aside. That being so, the defendants ought to have made an application to him for that purpose ; and not having done so, their application for prohibition was properly refused by my brother Rose.

I therefore think the appeal should be allowed, and that the judgment of my brother Rose should be restored.

Appeal dismissed with costs,
MACLENNAN, J.A., *dissenting.*

IN RE THE HAGGERT BROTHERS MANUFACTURING
COMPANY, (LIMITED.)

*Company—Winding-up—Power to Carry on Business—R. S. O. ch. 183,
sec. 8, sub-sec. 1.*

The paramount object of the Ontario Winding-up Act is the division of the company's assets among its creditors and members with all reasonable speed.

The power to carry on the business after winding-up proceedings have been commenced, and thus to postpone the final winding-up, is one which is not to be exercised unless a strong case of necessity for doing so exists.

That the mortgagees of the company's works, who have foreclosed their mortgage, will be enabled to dispose of the works to greater advantage, and that by affording facilities for procuring repairs to the purchasers of the machinery manufactured by the company the chances of obtaining payment of outstanding purchase notes will be improved, are not sufficient grounds to justify the carrying on of the business.

Judgment of the County Court of Peel reversed.

THIS was an appeal by a contributory from an order Statement.
made on the 27th April, 1893, by the Judge of the County Court of the County of Dufferin, sitting for the Judge of the County Court of the County of Peel, whereby it was ordered that John Smith, the liquidator of the company, should have power and authority to carry on the business of the company during the season of 1893, and for that purpose should have authority to borrow money for the purposes of the business, and to pledge the assets of the company to the extent of twenty per cent. or upwards, as security for the amount so borrowed.

The appeal was argued before OSLER, J. A., on the 30th of May, and 5th of June, 1893.

B. F. Justin, for the appellant.

Hoyles, Q. C., and *A. McKechnie*, for the respondent.

July 18th, 1893. OSLER, J. A. :—

The order winding up the company was made on the 5th May, 1891, and a few days afterwards, viz., on the 22nd May, an order somewhat similar to that now com-

Judgment.

OSLER,
J.A.

plained of was made, authorizing the liquidator to carry on the business of the company during the season of 1891, but limiting the power to pledge the assets of the company for money borrowed to the extent of twenty per cent. over the amount borrowed.

Another order was made on the 19th February, 1892, purporting to authorize the liquidator to carry on the business of the company indefinitely, and to borrow money for that purpose in the same way.

The order now in question was made on the application of the liquidator, supported by resolutions said to have been carried at a meeting of the contributories of the company, held on the 15th April, 1893.

These resolutions are in the following terms: "That the liquidator is hereby requested and authorized to carry on the works of the company in the same manner as during the preceding years, and for that purpose is authorized to make all necessary arrangements with the Dominion Bank and the corporation of Brampton; and that application be made to the Court to authorize such proceedings by the liquidator if necessary." This resolution was "declared carried, all present, with the exception of Mr. R. Haggert (the appellant), voting for the motion, Mr. Haggert voted against it, and claimed the right to vote on stock which he claimed in his own right, and also by proxy." It is to be inferred that others than contributories voted upon this resolution, as it was immediately followed by another: "Moved by Mr. Fleury, seconded by Mr. Mullin, that the stockholders here present approve of the resolution empowering the liquidator to carry on the works the present year as heretofore in terms of the resolution already declared to be carried."

For this resolution there were 85 votes; and against it 1056, represented by the vote of Robert Haggert, made up as follows: As executor of the estate of John Haggert 910
In his own right and by proxy 146

Objections were made to 750 of the votes cast as executor of the Haggert estate, on the ground that Robert Haggert had given an irrevocable proxy to vote thereon to another. The proxies were also objected to, but making every allowance for objections, it would seem that there must have been a majority against the second resolution.

The application for the order was supported by the affidavits (among others) of the liquidator and book-keeper of the company. It appeared that when the company went into liquidation they were indebted to the Dominion Bank in about \$140,000, as security for which the bank held notes taken by the company from its customers for machines, etc., sold by them. That the assets of the company, in addition to these notes, consisted of their shops, machinery, and plant, in the town of Brampton, together with some raw material and some second-hand threshing machinery and engines and book accounts to the amount of several thousand dollars, but of little real value. That the shops, machinery, and plant were then encumbered by a mortgage for \$75,000 from the company to the town of Brampton, upon which the town had since obtained a final order of foreclosure against the company. That since the company had gone into liquidation their works had been operated and the business carried on by the liquidator under the direction of the Court, and that the original indebtedness to the bank had been reduced by payments received on account of notes held by them from \$140,000 to \$59,600, or thereabout.

Two reasons are stated for carrying on the business of the company. One is that the purchasers of machines and outfit whose notes are current may be able to obtain the repairs which become necessary from time to time, and that these repairs cannot be made, or so conveniently made, in other machine shops which have not the necessary patterns; and it is said that the notes would probably become worthless, or that there would be a heavy shrinkage and loss on them if the makers could not thus procure these repairs. Another reason, upon which equal stress is

Judgment.

OSLER,
J. A.

Judgment. laid in the affidavits, is that the corporation of Brampton, who have foreclosed their mortgage, and who have been hitherto without success endeavouring to sell the shop, machinery, and plant, would be able to do so to much better advantage if the business were carried on by the liquidator as it had been for the past two years, so that it might be disposed of as a going concern; and it was said that the corporation was willing to allow him to have the use of the shops, etc., for the season of 1893, to operate the same for the benefit of the shareholders.

**OSLER,
J.A.**

The history of the company subsequent to the winding-up order and the case in support of the application are pretty fully disclosed in the cross-examination of the liquidator upon his affidavit.

[The learned Judge here referred to the evidence.]

Many affidavits were filed touching the competency and honesty of the liquidator, who appears not to have given security as required by the Act, nor to have kept his accounts in the manner required by the Act. These I consider not relevant.

The question which has been raised in this case is one of considerable importance. It has not been discussed in any decided case that I am aware of in our own Courts; and the decisions which have taken place under the corresponding provisions of the Company's Act, 1862, and the Bankruptcy Act, in England, are not numerous.

Section 8, sub-section (1) of the Winding-up Act, R. S. O. ch. 183, enacts that from the commencement of the winding-up, the company shall cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof.

Sub-section 2. The property of the company shall be applied in satisfaction of its liabilities, and subject thereto, and to the charges of the winding-up, shall be distributed among the members thereof according to their rights and interests in the company.

Sub-section 3. Liquidators are to be appointed for the purpose of winding up the affairs of the company and distributing the property.

(8) Their powers are to be exercised subject to the advice and direction of the inspectors where inspectors are appointed.

Judgment.

OSLER,
J.A.

(9) The contributories may, at any meeting, pass any resolution directing the liquidator how to dispose of any property, real or personal, of the company, and in default of such, he is to be subject to the directions, orders and instructions, which he may from time to time receive from the inspectors.

Then by section 9 it is declared that the liquidator shall have power (among other things), to carry on the business of the company so far as may be necessary for the beneficial winding-up of the same, and sub-section 8—to do and exercise all other acts and things necessary for the winding-up of the affairs of the company and the distribution of its assets.

From section 22, sub-section 3, it may be inferred that a reasonable period for carrying out the winding-up of the company is a year from the date of the winding-up order. Under the English Acts referred to, the sanction of the Court is essential to the exercise of the liquidator's power to carry on the business of the company. Under our Act that is not expressly required. The liquidator's powers are to be exercised subject to the advice orders and directions of the inspectors and contributories (section 8, sub-sections 8, 9), and the power to carry on the business is not one of those matters which under section 23 he is authorized to ask the Court to direct him to exercise. That section, sub-section (1), enacts that the liquidator or any contributory of the company may apply to the Court (1) to determine any question arising in the matter of the winding-up, or (2), to exercise all or any of the powers mentioned in the other sub-sections of that section. Unless therefore, the order in question was made by way of determining some question arising in the matter of the winding-up it would seem to have been made without authority and ought to be rescinded or reversed: *In re The D. A. Jones Co.*, 19 A. R. 63.

Judgment.

OSLER,
J.A.

The application for the order was not made to the Judge in that shape, but it may be regarded as substantially one to determine between the two opposing parties whose views should prevail, as the majority of the votes was certainly adverse to the action proposed to be taken by the liquidator, and may thus be taken as one to determine a question arising in the winding-up. In the *D. A. Jones* case it will be seen that the order was one which the Judge had no power under any circumstances to make, the course then proposed to be taken by the liquidator (a sale of the assets in block) being expressly prohibited unless sanctioned by the contributories at a meeting called for the purpose: sec. 9, sub-sec. 3.

I, therefore, proceed to consider the matter on the merits.

The paramount object of the Act plainly is the division of the company's assets among its creditors and members with all reasonable speed, and therefore the power to carry on the business and thus postpone the final winding-up is one which is not to be exercised unless a strong case of necessity for doing so exists. "Every creditor has a right to say, I want to have the estate administered, and it is only for the purpose of its administration and distribution and with a view to its beneficial winding-up that the power to carry on the business is given:" *Ex parte Emmanuel*, 17 Ch. D. 35, at p. 39, per James, L. J., where it was held that the majority of the creditors could not authorize the carrying on of the business because they expected to make a profit.

It is only so far as may be necessary for administration and realisation that such a course can be taken. "The word 'necessary' means that it must not be merely beneficial but something more, though the necessity must be determined by the Court, having regard to all the circumstances of the case. * * * What may be called a mercantile necessity—something which would be highly expedient under all the circumstances of the case for the beneficial winding-up of the company": *In re Wreck Recovery and Salvage Co.*, 15 Ch. D. 353, per Jessel, M.R., and Thesiger,

L.J. I refer also to *British Waggon Co. v. Lea & Co.*, 5 Q. B. D. 149; *Hire Purchase Furnishing Co. v. Richens*, 20 Q. B. D. 387; *Ex parte Cocks*, 21 Ch. D. 397; Buckley's Companies Acts, 6th ed., p. 277.

Judgment.

OSLER,
J.A.

I have not the advantage of knowing the views of the learned Judge of the County Court further than they are expressed in the formal order before me, but after having given the whole case the best consideration in my power, I am of opinion that the contention of the contributories who were opposed to the further carrying on of the business ought to have prevailed, and that the order in question ought not to have been made. The town of Brampton, one of the largest creditors of the company, have now, by the foreclosure of their mortgage, become the sole owners of the stock, machinery and plant of the company, and of the premises where the business is carried on. It does not appear that they were creditors except in respect of the mortgage debt, and it seems hardly necessary to say that however advantageous it might be to them to be able to dispose of their property as a going concern the desire to aid them in so doing can be no reason for postponing the winding-up. Great prominence has been given to this ground in the affidavits and examination, but I am unable to attach any weight to it whatever.

The other reason assigned for carrying on the business, namely, that it is necessary to do so in order to make repairs to the machinery sold, without which the notes given for the price may become worthless, has a more plausible aspect, but it seems to me to be self destructive.

The company is under no obligation to its customers to repair the machines and outfit sold to them; but even were the business to be carried on for the mere purpose of strengthening the securities held by the company, by affording facilities to the purchasers for procuring the necessary repairs, the period for which it might be necessary so to carry it on would be indefinite, extending over any time for which the notes might have to be renewed. But it is conceded that the business cannot profit-

Judgment.

OSLER,
J.A.

ably be carried on for the purpose only of making repairs, and therefore it must be carried on as before ; buying new material, entering into new contracts, manufacturing and selling new implements, etc., the volume of the business no doubt not quite so large as before, though still very large, and involving the necessity for large bank accommodation, and pledging the assets of the company, etc. As the liquidator admits, it is impossible to say when the necessity for making repairs will cease, for it must exist so long as the business is carried on and new machines are sent out and sold. The reason relied on, therefore, proves too much, for it proves that the company ought not to be wound up at all. If it is a good reason for allowing the business to be carried on this year, it is equally valid for each succeeding year, and would justify the company in renting the premises, machinery and plant for that purpose. I do not think that the possible difficulty of getting repairs done at other machine shops, which is really the foundation upon which the liquidator's case for continuing to carry on the business rests, so serious or insurmountable as to justify any further postponement of the winding-up, already too long delayed, of this company. I am of opinion, therefore, that the order should be reversed and set aside.

The appellant is entitled to his costs of the appeal and of resisting the proceedings below before the Judge, to be paid to him out of the estate by the liquidator.

Appeal allowed with costs.

ARDILL ET AL. V. CITIZENS' INSURANCE COMPANY.

ARDILL ET AL. V. ÆTNA INSURANCE COMPANY.

Fire Insurance—Contract for Sale—Change of Title—Change Material to the Risk—R. S. O. ch. 167, sec. 114—Damages.

The fact that the owners of an insured building have entered into an executory contract for the pulling down of the building in question and for the sale of the materials to the contractors at a sum very much less than the amount of the insurance is no bar to their right to recover the full amount of the insurance when the building is burnt down before the time fixed by the contract for the transfer of possession. Judgment of MACMAHON, J., 22 O. R. 529, affirmed.

THIS was an appeal by the defendants from the judgment of MACMAHON, J., reported 22 O. R. 529. Statement.

The plaintiffs were the Rector and Churchwardens of St. James' Church, Merritton, and brought the action against the two insurance companies to recover respectively the sums of \$1,500 and \$1,000, payable under policies issued by these companies upon the church building. The building was destroyed by fire on the 15th of March, 1892, and the main defence was that there had been a change of interest invalidating the policies, because on the 2nd of March, 1892, the then churchwardens entered into a contract for the erection of a new church upon the site of the old church, by one of the terms of which the materials in the old church building were sold to the contractors for the sum of \$200, and by which it was provided that the contractors should, on or before the 1st of September, 1892, build the new church and that they should have full possession of the premises and of the old church building "so that they may be able to commence operations on the 1st day of April next." This contract was not in fact entered into till the 14th of March, though dated the 2nd, and no notice of it was given to either of the companies. After the fire the plaintiffs made a settlement with the contractors by which they were allowed \$150 in lieu of the destroyed materials.

Argument.

The action was tried at St. Catharines on the 27th of September, 1892, before MACMAHON, J., who afterwards gave judgment in favour of the plaintiffs.

The defendants appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 30th of May, 1893.

Osler, Q. C., and H. H. Collier, for the appellants. The making of this contract effected a change of interest and of title, notice of which should have been given to the companies, and as notice was not given the policies became void. It cannot be said that entering into a contract of this kind was not a change material to the risk. It was an absolute assignment, without any condition, by which the right of property passed and only the right of possession until the 1st of April remained in the plaintiffs: *Hoit v. Stratton Mills*, 54 N. H. 109; *Johnston v. Shortreed*, 12 O. R. 633. At any rate the plaintiffs are not entitled to recover the full amount of the insurance. By the making of this agreement the building became a mere chattel, and in settling with the contractors after the fire the plaintiffs allowed in respect of the materials that had been destroyed the sum of \$150 only. As a contract of fire insurance is one of indemnity the plaintiffs are not entitled to recover more than the \$150 paid by them to the contractors: *Rayner v. Preston*, 18 Ch. D. 1; *Castelain v. Preston*, 11 Q. B. D. 380; *Darrell v. Tibbitts*, 5 Q. B. D. 560.

S. H. Blake, Q. C., and J. H. Ingersoll, for the respondents. The rights of the parties must be ascertained as they stood on the day of the fire. The subsequent settlement of the contractors' claim cannot affect the question of the amount that the plaintiffs are entitled to recover. There had been in fact no actual change of interest or title but merely an executory contract to transfer possession upon a certain day. Until that time it is clear that the property was at the risk of the plaintiffs,

and that in case of its destruction by fire they could not have compelled the contractors to carry out their contract without making them some allowance for the loss. That the plaintiffs should recover more than they had agreed to take for the materials in the old building is no business of the defendants: *Joyner v. Weeks*, [1891] 2 Q. B. 31. The defendants have contracted to pay a certain amount for insurance, and it is admitted that the building at the time it was burnt was worth the amount of that insurance. It is true that the contract of fire insurance is a contract of indemnity, but there is no right to substitute one value for another unless there has been actual subrogation. Up to the time of the destruction of the building it was being used by the plaintiffs as a place of worship, and up to that time there was no change whatever in its insurable value. If the making of this contract could be held material to the risk there was not enough time before the fire within which to give notice.

Oslor, Q. C., in reply.

October 27th, 1893. The judgment of the Court was delivered by

HAGARTY, C. J. O.:—

The facts are fully set out in the judgment of MACMAHON, J., before whom the case was tried without a jury.

It is fully admitted that there was no fraud or overvalue in the original insurance, nor is it urged that on the night of March 15th, when the fire took place, the value was not fully equal to amount insured.

The whole defence turns on the legal effect of a certain dealing between the insured and certain third persons as to replacing the wooden building insured by a better class of church of stone and brick.

It seems to me that on the destruction by fire the contractors might at once have repudiated the agreement, as the plaintiffs could not give them the old building, the

Judgment.

HAGARTY,
C.J.O.

subject matter of the bargain having, as it were, ceased to exist without either party's default.

The plaintiffs, before the day appointed, agreed to pay them a named sum in lieu of the property destroyed. This was in effect making a wise bargain after the disappearance of the property insured.

It is not necessary to decide here whether either party to an executory contract, wholly *in fieri*, would not be held to be relieved from performance on the destruction without default of either, of the subject matter of the bargain, on the legal implication that both must have contemplated its continued existence: See Lord Blackburn's judgment in *Taylor v. Caldwell*, 3 B. & S. 826, at p. 833.

I am of opinion that the case has to be decided without reference to the alleged contract. The insurable interest of the plaintiffs was in full existence up to the fire. Even if they had made a valid contract of sale, while title is being investigated, and before payment of purchase money or execution of conveyance, the insurable interest continues; but, if no bargain exist between vendor and vendee as to the existing insurance, and after payment of loss by the underwriters to the vendor the latter receives the full purchase money from the vendee, the insurers can recover back the amount paid to the vendor. I take it that the principle is fully established by such cases as *Collingridge v. Royal Exchange Assurance Corporation*, 3 Q. B. D. 173; *Castellain v. Preston*, 11 Q. B. D. 380.

The first case is very clear as to the right to recover from the underwriters after a binding contract of sale is entered into, but before completion by payment, etc.

It is said that the unexecuted bargain between the vendor and his vendee cannot affect his right to recover, otherwise he would have to rely on the solvency of his vendee, etc., etc.

The very elaborate judgments of Lord Esher, and of Cotton, and Bowen, L. JJ., are most exhaustive as to the general law. The doctrine of subrogation is fully discussed.

The insurer cannot be subrogated to a right of action until he has paid the sum insured and made good the loss, but it must be some right by the exercise or acquiring of which the loss against which the assured is insured, can be or has been diminished.

In the present case there is nothing to be gained by the defendants by enforcing their right to subrogation.

In cases of covenants to repair, it is no defence to shew that there would be in fact no damage, as where landlord had actually agreed on having the premises pulled down, and it was shewn that a tenant was ready to take a new lease at increased rent, etc., and it was held that agreements with third parties could not be given in evidence to answer or diminish the natural damages. Of course there is a distinction between such cases and insurance cases: *Rawlings v. Morgan*, 18 C. B. N. S. 776; *Morgan v. Hardy*, 17 Q. B. D. 770; *Joyner v. Weeks*, [1891] 2 Q. B. 31.

Admitting to the fullest extent that the contract here is for indemnity only, it is not easy to accept the defendants' application of the principle. A man has insured his house for \$5,000, its very reasonable value. He becomes more prosperous or ambitious and makes up his mind to pull down the old mansion and erect one more costly in its stead. A week or a day before commencing the execution of his design his house is accidentally burned. How can he be indemnified by the insurance in any other sense than by payment of the loss on the value of the house destroyed. Its value remained unchanged up to the loss.

He might carry out his design or abandon it. In either case it is hard to comprehend the argument that his claim for indemnity can be in any way affected or lessened by any plan or design he entertained when the loss occurred.

In carrying out his plan he would, in a sense, be a gainer by the fire; but is it possible that any intention on his part, until carried into execution, can in any way alter the rights between him and the insurers?

If by any act of his before the loss he was to receive money for or on account of some interest he had in the

Judgment.

HAGARTY,
C.J.O.

Judgment.

HAGARTY,
C.J.O.

assured property, on the receipt thereof we can understand this being necessarily taken into account in estimating his indemnity. Here he was not to receive and never could receive anything as or on account of the premises insured. I think that the defendants fail.

Appeal dismissed with costs.

FOX V. WILLIAMSON.

Action—Jury—Damages—Apportionment—Protection of Sheep Act—R. S. O. ch. 214, sec. 15.

The right of action given by R. S. O. ch. 214, sec. 15, to the owner of sheep killed by dogs, is to be prosecuted with the usual procedure of the appropriate forum. If, therefore, an action be properly brought in the County Court it may be tried before a jury, and where it is so tried, they, and not the judge, should apportion the damages if an apportionment be required.

Judgment of the County Court of Wellington reversed.

Statement.

THIS was an appeal by the plaintiff from the judgment of the County Court of Wellington.

The action was brought under the provisions of the Act for the Protection of Sheep, R. S. O. ch. 214, to recover from the defendant the value of sheep killed and injured by a dog of which the defendant was the owner. The plaintiff alleged that a settlement had been arrived at between himself and the defendant by which the defendant agreed to pay to him the sum of \$170, and that the defendant had paid to him \$25 on account. The plaintiff claimed payment of \$145, the balance of this sum, and in the alternative \$200 damages. The defendant denied that he had made any agreement and alleged that the \$25 referred to had not been paid by him, but had been received by the plaintiff as the proceeds of the sale of the sheep that were killed, and he tendered \$100 in satisfaction of the plaintiff's claim.

The action was tried before Chadwick, Co. J., and a jury, Statement.
at Guelph, and it was shewn that two dogs had been engaged in the destruction of the sheep. Two questions were submitted by the learned Judge to the jury, and these with their answers thereto were as follows :

Did Williamson agree to pay all the damages? No. What proportion of the damages should defendant pay having regard to the strength, ferocity and character of the two dogs? If more than \$100, how much more? \$25 more.

On these findings the defendant moved for judgment on the ground that by law the apportionment of the damages was a matter to be determined by the Court or Judge, and not by the jury, and that having regard to the evidence adduced \$100 would be quite sufficient to cover the portion of the damages reasonably chargeable to the defendant's dog, and this motion was successful.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ.A., on the 18th of September, 1893.

G. W. Field, for the appellant. Under the Protection of Sheep Act a right of action for damages is given to the owner of sheep worried by dogs, and there is nothing in the Act to restrict the mode in which that right may be prosecuted. Certain rules as to proof and evidence are laid down, but the fair interpretation of the Act is that the right of action may be prosecuted in the proper forum in the ordinary way. The plaintiff was therefore entitled to have his action tried before a jury, and if so the apportionment of damages by the jury was proper, and should not have been interfered with by the Judge. The Act refers to apportionment by the court, judge, or jury. If the judge alone were to have the power to apportion then it was unnecessary to use the word "court." If the action is being tried before a "court", that is before a judge and jury, both the quantum and apportionment of

Argument. damages must be decided by the jury under the direction of the judge in the ordinary way.

Johnston, Q. C., for the respondent. The reasonable interpretation of the section is that the apportionment of the damages is to be made by the judge alone. Where a jury is allowed to apportion damages it is expressly authorized so to do. See, for example, the Workmen's Compensation Act, sec. 8. The Protection of Sheep Act says that the "court or judge" may "decide" as to the apportionment. That is a word that could not possibly apply to assessments by a jury.

G. W. Field, in reply.

October 27th, 1893. The judgment of the Court was delivered by

OSLER, J. A. :—

The Act R. S. O. ch. 214, "An Act to impose a tax on dogs and for the protection of sheep," enacts (sec. 15) that the owner of any sheep killed or injured by any dog shall be entitled to recover the damage from the owner or keeper of the dog either by an action for damages or by summary proceedings before a justice of the peace, and that it shall not be necessary in such action or proceeding to prove the *scienter*.

This provision is taken from R. S. O., 1877, ch. 194, sec. 16, and the action for damages therein mentioned is in my opinion an action to be tried in the ordinary way before a judge and jury, or before a judge without a jury, as the case may be, the plaintiff being merely relieved from the necessity of proving a *scienter* on the part of the owner of the dog.

By 48 Vic. ch. 46, sec. 1, several sub-sections were added to the principal section.

Sub-section 2. If it shall appear to the court or judge at the trial of any such action for damages, or before the justice at the hearing of the said information or complaint,

that the damage or some part of the damage was the joint act of some other dog, and of the dog of the person "charged in such information or complaint," the court, judge, or justice shall have power to decide and apportion the damages among and against the respective owners and keepers of the said dogs as far as such owners are known in such proportion as the court, judge or justice shall see fit, and to award the same by the judgment of said court, or judge, or the conviction of the said justice.

Judgment.

OSLER,
J.A.

Sub-section 3 enacts that when in the opinion of the court, judge, or justice, the damages were occasioned by dogs the owner or owners of which are known, and dogs the owner or owners of which are unknown, or who have not been summoned to appear, the court, judge, or justice may decide and adjudge as to the proportion of such damages, which, having regard to the evidence adduced as to the strength, ferocity and character of the various dogs shewn to have been engaged in committing such damage, was probably done by the dogs of the summoned owners, and shall determine in respect thereof and apportion the damage which such court, judge or justice decides to have been probably done by the dogs of the summoned owners amongst the various summoned owners.

Sub-section 4. The same proceedings shall thereupon be had against any person found by the "judge or justice" to be the owner or keeper of any dogs which shall by such "court, judge or justice" be found to have contributed to the damage sustained, as if the information or complaint had been laid in the first instance against such person.

Sub-section 5. The "court, judge, or justice" shall not decide or apportion the damage against any person other than the person in the information or complaint first charged, nor award the same in the judgment or conviction without such other person having been first summoned before "the court, judge, or justice," and having had an opportunity of calling witnesses.

These provisions are framed in the loosest possible manner, and difficulties may arise in their practical appli-

Judgment.

OSLER,
J.A.

cation in some respects to the case of an action for damages. They seem to have been passed in the interest of the dog owner so that one owner shall not be made responsible under the Act for the whole damage where several dogs owned or kept by different persons appear to have been engaged in committing it, as he undoubtedly would be at common law where his *scienter* of the disposition of his own dog was proved. Here the case arises under sub-section 3, where the damage is occasioned by a dog the owner of which is known and is the defendant, and by a dog the owner of which is unknown. The case was being tried in the regular course by a jury. There is nothing in the Act which says that it may not be so tried, and apparently the only question to be considered, apart from the alleged agreement, was what proportion of the damages the defendant ought to pay having regard to the evidence of the strength, ferocity and character of the two dogs. I can by no means agree with the learned Judge that this question is one which is in all cases relegated by the Act to be decided by the Judge. He no doubt is to do so when the case is tried by him without a jury, as a justice of the peace must do when summary proceedings are adopted. But where there is a jury I see nothing to indicate that questions of damage, proportional or total, were intended to be reserved from that part of the tribunal to which such questions usually fall, and I think it is in reference to that mode of trial, as distinguished from trial by the judge alone, that the word "court" was probably used as it would otherwise be a superfluous or unnecessary expression.

The case having been tried on the footing of the defendant being liable for a proportion of the damage only under sub-section 3, I am of opinion that it was properly left to the jury to make the apportionment, and that their finding should not have been interfered with. Whether it was the intention of the Act to allow the owner of any dog shewn to have been engaged in the destruction of the sheep to escape liability for the whole damage where he

was aided by the dog of an unknown owner, is not very clear. There would be great difficulty in that case in making the municipality liable under the 18th section for the proportion of the damage done by the dog of the unknown owner. This point is not before us for decision, and the Act in this and other respects invites amendment. I may add that sub-section 6 of section 15 seems to me to be necessarily confined to appeals from summary proceedings.

Judgment.

OSLER,
J.A.

The appeal in my opinion should be allowed and judgment entered for the plaintiff in the Court below for \$25, as found by the jury, with costs.

Appeal allowed with costs.

BANK OF HAMILTON V. AITKEN.

Creditors' Relief Act—Certificate of Claim—Contestation—R. S. O. ch. 65, sec. 10, sub-sec. 1—Absconding Debtors' Act—"Commencing Proceedings"—R. S. O. ch. 66, sec. 26.

Although, under the Creditors' Relief Act, a creditor who does not come in within the period prescribed, may not be entitled to rank for a dividend, he is interested in the proper distribution of the moneys realized, and is therefore under section 10 of the Act entitled to contest the certificates of claim of other creditors, for in case of success there may be a surplus available for him, or at least the liabilities of the common debtor will be reduced.

Per HAGARTY, C. J. O., and OSLER, J. A.—Making the affidavit of claim is not commencing proceedings within the meaning of section 26 of the Absconding Debtors' Act, R. S. O. ch. 66. Something to bring the claim within the control of the Court must be done before it can be said that proceedings have commenced.

Per MACLENNAN, J. A.—Making the affidavit is the first step directed by the Act, and if the further steps be then taken in good faith and without undue delay, the making of the affidavit may properly be regarded as the commencement of proceedings.

Quære, per MACLENNAN, J. A.—Whether proceedings against an absconding debtor under the Absconding Debtors' Act, R. S. O. ch. 66, must not still be commenced by writ of attachment.

Judgment of the County Court of Simcoe reversed.

Statement.

THIS was an appeal by H. J. Nolan from the judgment of the County Court of Simcoe.

On the 1st of September, 1892, an order of attachment under the Absconding Debtors' Act was made against H. C. Aitken on the application of the Bank of Hamilton and was received by the sheriff of the county of Simcoe on the following day. A seizure was made under this order and the sheriff realized out of the assets seized the sum of \$6,014.94, and stated on the 7th of April, 1893, that he expected to realize about \$500 more. The Bank of Hamilton in addition to the claim in respect of which the attaching order had been issued, had brought in a claim under the Creditors' Relief Act for \$71,513.85, and a certificate thereof had been duly filed with the sheriff, the total amount of executions and certified claims in the hands of the sheriff on the 7th of April, 1893, being \$77,986.85. The appellant Nolan, under the Creditors' Relief Act, obtained on the 22nd of March, 1893, a certificate of claim

of \$398.18, and filed this with the sheriff in due course. Statement
This certificate was founded upon an affidavit sworn on the 27th of February, 1893, but not filed till the 7th of March, 1893, having been substitutionally served on the debtor on the 6th of March, 1893, pursuant to an order for substitutional service made on that day.

On the 30th of March, 1893, Nolan filed a notice of contestation of the claim of the plaintiffs, and on motion made by the plaintiffs before the Junior Judge on the 21st of April, 1893, "the certificate and other proceedings had and taken by the said H. J. Nolan under section 10 of the Creditors' Relief Act, for the purpose of contesting the claim of the claimants and the notice served by the sheriff upon the claimants," were set aside with costs.

Nolan appealed and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ.A., on the 19th of September, 1893.

John Hood, for the appellant. The appellant is admittedly a creditor of the debtor, and the learned Judge was wrong in setting aside the certificate of claim obtained by him. Even if the appellant was not entitled to share in the moneys in the sheriff's hands, still his certificate of claim was perfectly good, and would avail him in case further assets were afterwards discovered. But the learned Judge was wrong in holding that the appellant was not entitled to share in the moneys in the sheriff's hands. The Act requires that proceedings should be commenced within six months of the time of the issue of the writ of attachment. Here proceedings were commenced within that time as the affidavit of claim, the first step towards, and the necessary foundation for, the ascertainment of the claim was sworn to before the six months expired, and as it was afterwards in due course filed and served, the date of the swearing should be held to be the commencement of the proceedings. Apart, however, from this, and even assuming that the proceedings were not commenced within

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Argument. six months, still the appellant is a creditor of the common debtor, and is interested, within the meaning of section 10 of the Act, in disputing the claim of the plaintiffs, and was entitled to have an issue directed to try the validity of that claim. If the claim of the plaintiffs is disallowed, there will be enough to pay all the other claims in full and to leave a surplus to answer in part the claim of the appellant.

Aylesworth, Q. C., for the respondents. The appellant is barred under section 26 of R. S. O. ch. 66, and therefore is not, under section 10 of the Creditors' Relief Act, a person interested in the proceeds, and is not entitled to contest the plaintiffs' claim. The mere making of the affidavit cannot be held to be the commencement of proceedings within the meaning of section 26. Making an affidavit is not the institution of proceedings. There must be something in the nature of a resort to the Court—something that commits the party to litigation. The filing of the affidavit and the issue of the certificate are probably what would be regarded as the commencement of the proceedings, or at least the service of the affidavit and notice. Unless something is done that brings the matter within the control of the Court, and to the notice of the opposite party, the time for distribution might be indefinitely postponed, for there would be nothing to prevent a person from making an affidavit and then putting it aside for weeks or months.

John Hood, in reply.

October 27th, 1893. OSLER, J. A. :—

I cannot gather from the papers on what ground the appellant's execution certificate was set aside by the order appealed from, as it appears to have been regularly obtained under the provisions of the sixth, seventh, eighth, and ninth sections of the Creditors' Relief Act. It may be that if his proceedings were not commenced within the period mentioned in section 26 of the Absconding

Debtors' Act, R. S. O. ch. 66, he will not be entitled to share in the distribution of the property of the debtor, in case it is insufficient to satisfy other executions and claims certified, which were lodged or taken within the prescribed time, but I do not see how that can affect the validity of his certificate, which must remain in the sheriff's hands *valeat quantum*, and may be available to attach upon any balance which remains there after satisfying those executions and certificates which are entitled to share. The order complained of, therefore, goes too far. But it also sets aside certain proceedings which the appellant had taken under section 10 of the Creditors' Relief Act, R. S. O. ch. 65, to contest a claim, amounting to \$71,513.85, for which the bank had obtained, or were proceeding under section 11 to obtain, an execution certificate against the debtor in addition to that for which they had already obtained judgment in the attachment. This large claim, if valid, was one for which they would be entitled to share in the distribution under the attachment, having commenced their own proceedings in respect of it within the prescribed time. They might have defended Nolan's contestation of their claim by shewing if they could that he was not a creditor interested in contesting it (R. S. O. ch. 65, sec. 10, sub-sec. 1), but instead of taking that course they seem to have attacked both his certificate and the proceedings which he had taken against them by a substantive motion to set them aside, on no other ground than that he was not entitled to share in the distribution of the money in the sheriff's hands by reason of his having commenced the proceedings to obtain his certificate too late. This, as I have said, might be an answer to his being allowed to share, but it cannot affect the validity of the certificate itself.

The question then is, whether the appellant has a sufficient status as a creditor to entitle him to contest the bank's claim under their execution certificate for \$71,513.85.

Judgment.

OSLER,
J.A.

Judgment

OHLER,
J.A.

Section 10, sub-sec. 1 of the Act enacts that the claim may be contested by the execution debtor, or by a creditor *interested in contesting* the same. If under no circumstances could the creditor be interested in the proceeds realized, or about to be realized, under the executions prior to his own, it may properly be held that he is not a competent contestant. If, on the other hand, the result of a successful contestation might be to enable him to reach a fund which would otherwise be covered by the impeached execution, his interest and status are at once established.

The objection to his contestation was based upon section 26 of the Absconding Debtors' Act, which enacts that if the property is insufficient to satisfy the executions and other claims certified, none shall be allowed to share unless their proceedings under that Act or the Creditors' Relief Act, were commenced within six months from the date of the first writ of attachment, and it was contended that the appellant's proceedings had not been so commenced. The respondents' application might well have been dismissed in the Court below on the ground that they had not actually proved the date of the first writ of attachment. The affidavit of the solicitor speaks merely of the date of the first *order* of attachment, which may have been made several days before the issue of the writ, in which case it is quite possible that the appellant's proceedings may have been commenced in time. I think, however, that it was throughout the argument assumed that the writ bore the same date as the order, and if so, it was issued on the 1st September, 1892, more than six months before the appellants' proceedings were, in my opinion, commenced.

The reasons of appeal, it may be noticed, speak of the writ of attachment, and we may take it for granted that there was one. I refrain from entering upon any speculation as to whether an order of attachment is the equivalent of, or is now substituted throughout the Absconding Debtors' Act for, the writ of attachment, or as to what the appellant's rights may be if no writ of attach-

ment was issued, because these are matters which were not touched upon in the argument, and the decision of which is not in my view necessary for the purpose of this appeal.

Judgment.

OSLER,
J.A.

Then, with regard to the commencement of the appellant's proceedings:—The affidavit in support of his claim under section 7, sub-section 1, was sworn on the 27th February, 1893, but no use was made of it until the 7th of March, when it was filed and served pursuant to sub-section 2 of that section. I agree with the learned Judge of the Court below (if that is what he decided) that the first effective proceeding under the Act, was that taken on the 6th of March, which was after the expiration of six months from the date of the first writ. I cannot agree that an affidavit sworn, but not used in any way within the time, *i. e.*, within the six months, is a proceeding within the meaning of the 26th section. It cannot be compared to a proceeding taken in Court, such as the issue of a writ by which an action is actually commenced and which expires unless served or renewed within a limited time. It remained in the creditor's possession and control. He could not be compelled to file or to use it or produce it. No contestation could be raised upon it under section 11, sub-section 2. Until filed or served, its use rested merely in the creditor's intention, and there was nothing, which so far as any one else was concerned, committed him to anything. Section 20, sub-section 1, as amended by 51 Vic. ch. 11, sub-sec. 3, supports this view, as it provides that in case the debtor, without sale by the sheriff, pays the executions and claims (by which last I understand execution certificates) in the sheriff's hands at the time of such payment, and no other claim has been *filed with the clerk*; or in case all executions and claims in the sheriff's hands are withdrawn, and any claims *served*, are paid or withdrawn, no notice shall be entered by the sheriff as required by section 4; and no further proceedings shall be taken under the Act against the debtor by virtue of the executions having been in the sheriff's hands.

In the one case the filing of the claim with the clerk, and

Judgment.

OSLER,
J.A.

in the other, its service upon the debtor, is regarded as the effective proceeding to entitle the claimant to the benefit of the Act.

If, therefore, the appellant's case depended upon the question whether his proceedings under the Creditors' Relief Act had been commenced within the six months, I should be of opinion that his contestation had been properly dismissed or quashed, and that to that extent the order appealed from ought to stand.

But it is shewn that he has an interest in opposing the bank's claim quite independently of this objection. In the affidavit of Mr. Hewson, sworn on the 7th April, he says that the total amount of the executions and claims certified in the sheriff's hands on the previous day, was \$77,986.85. This included the bank's claim now in question (\$71,513.85), and the appellant's claim of \$398.18, and the costs of each. He further says that the sheriff had realized at that date \$6,014.94, and might possibly realize \$500 more. Deducting, therefore, the disputed claim of the bank, and also that of the appellant, the executions and certificates entitled to share, would be \$6,074.82, to meet which there is or may be \$6,514.94, thus leaving a balance nearly sufficient to pay the execution of the appellant in full, if he can succeed in defeating the bank's large claim.

If, on the other hand, he is not permitted to contest it, or should do so unsuccessfully, it would simply stand, and the bank then come in with the rest of the creditors who commenced their proceedings in time, and the whole proceeds would be distributed among them to the exclusion of the appellant.

His appeal must therefore be allowed, the bank's motion to set aside his contestation dismissed, and the latter heard and determined on its merits.

HAGARTY, C. J. O. :—

I agree.

MACLENNAN, J. A. :—

Judgment.

MACLENNAN,
J.A.

The ground on which the learned Judge appears to have proceeded is that the appellant commenced his proceedings against the debtor more than six months after the issue of the first writ of attachment against him, and so by virtue of section 26 of the Act respecting Absconding Debtors, was not entitled to share in his property and effects, there not being sufficient to satisfy all, and that such being the case he was not a creditor interested in contesting the bank's claim within the meaning of section 10 of the Creditors' Relief Act.

There seems no ground whatever for setting aside the appellant's certificate, and to that extent the order is plainly wrong, for even if the appellant's proceedings were not commenced within the six months, he had a right to obtain his certificate, and he thereby became an execution creditor and entitled to be paid out of the surplus, if any, after payment of those who were within the six months, and if none, then out of any future property of the debtor.

But I also think the order is wrong in setting aside the appellant's proceedings to contest the bank's claim. I think his interest to attack the claim is clear.

If the result of a successful attack upon the bank's claim would leave a surplus after paying the other claims which are within the six months, it was not disputed that in that case he had a sufficient interest. But it was said that there would be no surplus, and that as there would be nothing for him, he had none. My brother Osler has shewn that there is a surplus, and that therefore that argument fails. But I think the interest remains, even if it were conceded there was to be no surplus. Execution creditors are entitled to seize not only all the debtor's present goods, but also any goods he may have in the future, until their debts are fully paid and satisfied, and therefore, whether the appellant is entitled to be paid *pari passu* with the bank, or must wait until the bank is paid

Judgment. in full, he has, in my opinion, the very plainest interest in
MACLENNAN, contesting the bank's claim, and shewing, if he can, that it
J.A. is invalid. The existence of the appellant's interest is
apparent from another consideration. The original execu-
tion was founded on a judgment, and could, therefore, not
be contested; but that amounted only to \$2,143, while the
property realized comes to \$6,000. Now, if the appellant
were to contest one or more of the other claims success-
fully, including this second claim of the bank, there would
then, beyond all question, be a sufficient surplus to pay him
in full; and if he might contest several of the claims, it
follows that he may contest any one of them.

It seems that the appellant's affidavit for the purpose of
proving his claim, was sworn on the 27th February, 1893,
that an order for substitutional service on the debtor was
obtained on the 6th of March, and that the claim was
filed on the following day, the 7th of March. It is said
that the date of the first writ of attachment as mentioned
in section 26 of the Absconding Debtors' Act, was the
1st of September, 1892, and it is contended that the
appellant's proceedings must be regarded as having com-
menced not on the 27th February, which would be within
the six months, but on the 7th of March when the affidavit,
having been served on the debtor, was filed with the clerk
of the Court. I am unable to agree with the other members
of the Court, that the making of the affidavit was not the
commencement of the proceedings within the meaning of
section 26. The expression used is, "proceedings * *
under the Creditors' Relief Act, * * were commenced
within six months from the date of the first writ of
attachment." Now, when we look at the Creditors' Relief
Act to see what the proceedings are, which are prescribed,
we find that the very first step that has to be taken is the
making in duplicate by the claimant of an affidavit of his
debt, and the particulars thereof, the form of which is
given in a schedule, for the purpose of being served on the
debtor. Section 7 (1) of the Act directs this to be done;
and sub-section 2 directs that one of these duplicate

affidavits is to be served on the debtor, and along with it a notice stating that the claimant intends to file the other duplicate with the clerk of the County Court, etc. The form of this notice is also given in a schedule. This subsection also contemplates that the service may be made out of Ontario, and that in that case the Judge shall limit the time at which the next step may be taken by the claimant; that is the time within which he can obtain a certificate of the allowance of the claim in case of its not being contested.

Judgment.

MAULENNAN,
J.A.

Now, although the affidavit has to be made in duplicate, it does not contemplate that it shall be filed until after the service, for the form of affidavit of service is also prescribed (Schedule D.), and it states, that he was personally served "with an original affidavit identical with the annexed affidavit, and that there was at the time the said affidavit was so served, attached to (or endorsed upon) the said affidavit so served, a true copy of the notice addressed to the debtor now attached to or endorsed upon the said annexed affidavit." So that what the claimant has to do, is to prepare his affidavit in duplicate, according to a prescribed form, and also a notice in a similarly prescribed form, and to serve them upon the debtor. This service may be a matter of time; he may have to be served out of Ontario, and it may take days or weeks or even months to serve him within Ontario; and it is only after the service that anything is required to be filed. By this delay, involuntary on his part, the claimant may lose his right to rateable payment, unless it be held that the making of the affidavit is a commencement of proceedings. According to the forms prescribed, the affidavit and the notice must be entitled in the Court; and I do not see why, when they are ultimately served and filed, the proceedings cannot, with propriety, be regarded as having been commenced, for the purposes of section 26, when the affidavits were sworn. I think the Act prescribing as it does the proceedings which are to be taken, it cannot be denied that the claimant has commenced his proceedings when he has made his

Judgment. affidavit in duplicate if he has followed it up afterwards
MACLENNAN, as the Act directs. I therefore think that the claimant's
J.A. proceedings were commenced within six months after the
issue of the first writ of attachment, if there was in fact
any such writ.

It is, however, a grave question in my mind, whether, if no writ of attachment was issued in this case, and if, as seems probable, only an order was obtained, section 26 could be held applicable. The rules do not abolish the writ of attachment, as was done in the case of writs of injunction, *capias ad respondendum*, and other writs; and sections 2, 3, 4, and 5 of the Absconding Debtors' Act are unrepealed. I doubt very much whether we can give such an effect to Consol. Rules 1089 *et seq.*, as to hold that the writ is dispensed with, and that an order is substituted for it, as is suggested in Holmsted and Langton's Judicature Act, pp. 845-6.

Appeal allowed with costs.

SULLIVAN V. MCWILLIAM.

Negligence—Highway—Horse.

It is not negligence *per se* for the driver of a horse of a quiet disposition standing in the street to let go the reins while he alights from the vehicle to fasten a head weight, there being at the time little traffic and no noise or disturbance to frighten the animal; and the owner of the horse is not responsible for damages caused by the horse in running away when frightened by a sudden noise just after the driver has alighted.

Judgment of the County Court of York reversed.

THIS was an appeal by the defendants from the judgment of the County Court of York. Statement.

The action was brought to recover the value of a horse of the plaintiffs killed in a collision with a horse and waggon of the defendants. The defendants' servant was engaged in the delivery of parcels for them, and was using one of their waggons for that purpose but was, with their consent and knowledge, driving the horse of another person for the purpose of exercising it. It was proved, however, that the driver had driven the horse before, and that it was to his knowledge of a very quiet disposition. He drove into a lane leading from Church street to the side entrance of the defendants' warehouse for a load. The reins were long and were tied to the seat to prevent them from falling out and dragging on the ground. On reaching the side entrance of the warehouse he jumped out of the waggon and went to its side between the fore and hind wheels to get out a head weight. While engaged in doing this some empty barrels which were piled at the side of the lane a little to one side of the horse fell down and, startled by the noise, the horse ran off, the shaft of the waggon striking the plaintiffs' horse and killing it. The lane in question was a public lane, but was little used for traffic, and at the time of the accident there were few people about and there was no unusual noise or disturbance.

Statement. The action was tried before Morgan, Co. J., at Toronto on the 19th of June, 1893, when judgment was given in favour of the plaintiffs for \$125 and costs.

The defendants appealed and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, J.J.A., on the 18th of September, 1893.

E. B. Ryckman, for the appellants.

Fullerton, Q. C., for the respondents.

October 27th, 1893. OSLER, J. A. :—

The question whether the defendants' servant was negligent, is really the only question on this appeal. I think we cannot interfere with the learned Judge's holding on the question of contributory negligence. Nor do I see that it is open to the defendants to argue that the horse which O'Donnell, their servant, was driving, was not, for the purposes of the action, their horse. It is true that O'Donnell had substituted it temporarily for the horse he was entrusted to drive, but one of the defendants had seen it in the waggon while being driven by him on their business, and had not interfered, intending to make some enquiry of his partner about it, and left O'Donnell to go on driving and using it for the afternoon. This, it appears to me, precludes them from now saying that the latter was going beyond his authority in so using it when the accident happened.

The question then is, whether the learned Judge ought to have held that the defendants' driver was guilty of negligence. I shall take his evidence as being that which the learned Judge himself relied upon, and as giving the most probable and reasonable account of the occurrence, so far as it arose from anything which he did or omitted to do.

It appears to me to be a strong thing to say that the case disclosed by that evidence is one of actionable negligence, and I am constrained to differ from the

learned Judge's finding in this respect. It may be conceded that where an accident happens in consequence of a man's horse running away unattended along a highway, that, unexplained, is some evidence of negligence, because it is more consistent with the absence of ordinary care in superintending the horse, than with such care having been used: *Watson v. Weekes*, cited in *Tolhausen v. Davies*, 59 L. T. N. S. 436. "Looking at the matter," says Bramwell, B., in *Byrne v. Boudle*, 2 H. & C. 722, "in a reasonable way, it comes to this—an injury is done to the plaintiff who has no means of knowing whether it was the result of negligence; the defendant, who knows how it was caused, does not think fit to tell."

Judgment.

OSLER,
J.A.

Here the defendants' servant does explain how it was that the horse escaped from him and ran away, and I think it is impossible to hold, without a most serious interference with the ordinary conduct and management of such business and affairs of life as this suit is concerned with, that he was guilty of negligence.

"Negligence," says Alderson, B., in a well-known case, "consists in the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do, in either case unintentionally causing mischief to a third party." (*Blyth v. Birmingham Waterworks Co.*, 11 Exch. at p. 784.)

I fail to see anything in O'Donnell's conduct amounting to negligence within this definition. He got out of his waggon without keeping the reins in his hand it is true. The horse it is said had been taken out because he needed exercise, and the learned Judge, in his judgment, describes him as "fresh," meaning, I suppose, that he was lively, excitable, or spirited from want of exercise, and therefore needing more than usual care. But there is no evidence of this, and the witness does not so describe him, but on the contrary, refuses to adopt that as a word descriptive of the horse's condition, repeating that he was "quiet, very quiet." Nor is there anything in the surrounding circumstances relating to O'Donnell's know-

Judgment. ledge of the horse and the condition of the street, which indicates that more than ordinary care was required. A passage in the judgment of Earl, J., in the case of *Wasmer v. Delaware etc., R. W. Co.*, 80 N. Y. 212, is pertinent: "There is no absolute rule of law that requires one who has a horse in a street to tie him, or to hold him by the reins. It would doubtless be careless to leave a horse in a street wholly unattended without tying him to something. But it is common for persons doing business in streets with horses to leave them standing in their immediate presence while they attend to the business, and it is not unlawful for them to do so. It is commonly safe so to do, and accidents are rarely occasioned thereby. There is no proof that this horse was vicious, unsafe, or unmanageable. (The intestate) was near his horse, and might expect, in an emergency, to control him by his voice, or to reach him before he could escape." In the same direction are the observations of the Court in *Tolhausen v. Davies*, 59 L. T. N. S. 436, 437, as to whether there was evidence of the horse having run away in consequence of want of ordinary care on the part of its attendant. In *Lynch v. Nurdin*, 1 Q. B. 29 (1841), Lord Denman giving the judgment of the Court, says: "It is a matter strictly within the province of the jury deciding on the circumstances of each case. They would naturally enquire whether the horse was vicious or steady; whether the occasion required the servant to be so long absent from his charge, and whether in that case no assistance could have been procured to watch the horse; whether the street was at that hour likely to be clear or thronged with a noisy multitude," etc. See also *Illidge v. Goodwin*, 5 C. & P. 190 (1832), cited in the last case, and *Goodman v. Taylor*, 5 C. & P. 410.

It cannot be too clearly understood that the question in all such cases is one of negligence, depending in each upon all the surrounding circumstances, and that the fact that the owner or driver of the animal is lawfully using it on the highway, is not an answer against all possible accidents

which may be caused by it. The evidence in this case shews that the defendants' horse was not left standing in the street unattended; and I am of opinion that there was no evidence of the absence of reasonable care on the part of their servant; and that the learned County Court Judge ought to have so held. The nature of the evidence upon which he acted is such that we are in as good a position as he was to form an opinion upon it, and we have the right (which does not exist in County Court appeals in England) to review his finding, and the parties are entitled to an independent judgment on the point. I think, therefore, with all respect, that the judgment should be reversed and the appeal allowed.

Judgment.

OSLER,
J.A.

I refer also to Elliott on Roads, pp. 316, 317, 627, 628

HAGARTY, C. J. O. :—

I agree.

MACLENNAN, J. A. :—

I am of opinion that this appeal should be allowed, and that the action should be dismissed.

All the authorities shew that it is only where he is guilty of negligence either by himself or his servant that the owner of a horse is liable for damage done by collision on a highway. In *Holmes v. Mather*, L. R. 10 Exch. 261, at p. 267, Bramwell, B., said : " For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid." When cattle are being driven along a road or street whether in town or country, and they trespass upon adjoining land or even enter uninvited into an adjacent shop or dwelling house, the owner is not liable for the damage except on proof of negligence : *Goodwin v. Cheveley*, 4 H. & N. 631 ; *Tillett v. Ward*, 10 Q. B. D. 17. The case of a highway seems to be an exception from a general rule that the owner of

Judgment. domestic animals is bound at his peril to keep them from committing trespass. The general rule is stated by Brett, J., in *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10, to be "that in the case of animals trespassing on land, the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a trespass."

MAOLENNAN,
J. A.

Such being the law the sole question in this case is whether the defendants' driver was guilty of negligence. If he was not, the defendants are not liable, notwithstanding the unfortunate loss which the plaintiffs have suffered. The learned Judge says that taking the evidence of O'Donnell (the driver) as absolutely true, and giving an accurate account of his conduct, he did not do all that under the circumstances was reasonably prudent and careful in the management and control of the horse. In saying this I think we must take it that the learned Judge did not think it safe to place any reliance on the evidence of another witness, who differed from the driver, and said that the latter had entered the house for some time and had left the horse unattended. Taking the driver's account of the matter then, as the learned Judge appears to have done, as the true account, I am bound to say that I think there was no evidence at all of negligence. I think he did just what any person of ordinary carefulness and prudence would have done under the same circumstances. The horse was quiet and accustomed to the streets. There was nothing unusual going on, or likely to happen, no crowd, no noise, no band of music. When he drew up he dropped the reins on the seat, jumped out and stepped back to get his weight with which to make the horse fast, but at that moment the barrel fell and frightened the horse and he suddenly ran off before the driver could secure him. I think this was in law a mere accident, and that the driver did no more than careful persons do every day in the management of their horses on the streets, and that there was no negligence proved. In view of the evidence given by the

other witness, if there had been a jury the learned Judge would probably have had to leave it to them to say whether they believed him or the driver, and to tell them that it was some evidence of negligence to go into the house for a time and to leave the horse untied and unattended. But there not having been a jury, and the learned Judge having taken the driver's account of the matter as the true one, I think there was no negligence proved.

Judgment.

MACLENNAN,
J.A.

Appeal allowed with costs.

REGINA V. HAZEN.

Justice of the Peace—Summary Conviction—Information—Two Offences—“Defect in Substance or in Form”—Adjournment—Criminal Code, 1892, secs. 845 (3), 847, 857—Distress—Imprisonment—Liquor License Act, R. S. O. ch. 194, sec. 70.

An information stated that the defendant “within the space of thirty days last past, to wit on the 30th and 31st days of July, 1892, * * * did unlawfully sell intoxicating liquor without the license therefor by law required” :—

Per HAGARTY, C. J. O., and BOYD, C. :—Such an information does not charge two offences but only the single offence of selling unlawfully within the thirty days.

Per OSLER, and MACLENNAN, J.J.A. :—Such an information does charge two offences and is in contravention of section 845 (3) of the Criminal Code, 1892.

But, *per Curiam*, assuming that an information so worded does contravene the provisions of section 845 (3) of the Criminal Code, 1892, the defect is one “in substance or in form” within the meaning of the curative section (847) and does not invalidate an otherwise valid conviction for a single offence.

The provision of section 857, that no adjournment shall be for more than eight days is matter of procedure and may be waived and a defendant who consents to an adjournment for more than eight days cannot afterwards complain in that respect.

A conviction for a first offence under section 70 of the Liquor License Act, R. S. O. ch. 194, properly awards imprisonment in default of payment of the fine and not in default of sufficient distress.

Regina v. Smith, 46 U. C. R. 442, and *Regina v. Hartley*, 20 O. R. 481, approved.

Judgment of the Queen's Bench Division, 23 O. R. 387, reversed.

THIS was an appeal by the Attorney-General for Ontario from the judgment of the Queen's Bench Division, reported 23 O. R. 387. Statement.

Statement.

The conviction in question was founded on an information laid on the 22nd of August, 1892, by the license inspector of the county of Elgin, before the police magistrate of the town of Aylmer, charging that the defendant "within the space of thirty days last past, to wit, on the 30th and 31st days of July, 1892, at the township of Yarmouth, in the county aforesaid, did unlawfully sell intoxicating liquor without the license therefor by law required."

The defendant appeared before the magistrate on the 25th of August, 1892, and pleaded not guilty, and evidence was then adduced to shew that she had sold intoxicating liquor on both the 30th and 31st of July, 1892. The hearing was then, with the consent of the defendant's counsel, adjourned till the 3rd of September, 1892, when evidence was adduced for the defence, and the magistrate found the defendant "guilty of having sold intoxicating liquor without the license therefor by law required," and imposed a fine of \$50 and costs, with three months' imprisonment in default.

On the 12th of September, 1892, the magistrate returned to and filed with the clerk of the peace, a conviction stating that the defendant was convicted "for that the said Hattie Hazen, on the 30th and 31st days of August (*sic*), A.D. 1892, * * * unlawfully did sell liquor without the license therefor by law required," but afterwards, on the 10th of October, 1892, he returned to and filed with the clerk an amended conviction, stating that the defendant was convicted "for that she, the said Hattie Hazen, on the 31st of July, A.D. 1892, * * * unlawfully did sell liquor without the license therefor by law required," and the adjudication was that the sum of \$50 and costs should be paid within a week, and that in default the defendant should be imprisoned for three calendar months, nothing being said as to levying the fine and costs by distress.

Proceedings by writ of *certiorari* were taken, and on the 4th of March, 1893, the Queen's Bench Division quashed the conviction.

An appeal was taken by the Attorney-General for Argument.
Ontario, and was argued before HAGARTY, C.J.O., BOYD, C.,
and OSLER, and MACLENNAN, JJ.A., on the 22nd of Sep-
tember, 1893.

J. R. Cartwright, Q.C., and *Langton*, Q.C., for the appeal;
The Queen's Bench Division quashed this conviction
on the ground that the information charges more than one
offence, but it is submitted that the information charges
but one offence, namely, the offence of unlawfully selling
intoxicating liquor within the space of thirty days last
past. If, however, the proper construction of the infor-
mation is that more than one offence is charged that is a
defect in substance or in form within the meaning of sec-
tion 847 of the Criminal Code, 1892. This was expressly
decided in *Rodgers v. Richards*, [1892] 1 Q. B. 555. The
Court below refused to follow that case, holding that it
was inconsistent with the later case of *Hamilton v. Walker*,
[1892] 2 Q. B. 25. But there is in reality no inconsistency,
and *Hamilton v. Walker*, does not apply at all. In that
case there was clearly a double charge with evidence taken
on each charge, and in arriving at the conviction the evi-
dence on the second charge was used in aid of the evidence
on the first charge. This information simply charges a
single offence between certain dates, and is good: *Onley*
v. Gee, 30 L. J. M. C. 222; *Bartholomew v. Wiseman*, 8
Times L. R. 147. Besides, the defendant made no objec-
tion to the information, and cannot now complain: *Regina*
v. Roe, 16 O. R. 1; *Regina v. Bernard*, 4 O. R. 603;
Paley on Convictions, 7th ed., pp. 107, 108; *Crawford v.*
Beattie, 39 U. C. R. 13; *Regina v. Clarke*, 20 O. R. 642.

Tremear, for the respondent. The conviction expressly
states that the sale took place on two distinct days, and
clearly charges two offences, so that there has been a direct
contravention of section 845 (3) of the Criminal Code, 1892.
Evidence was given of sale on both days, and it is not
possible to separate the evidence so as to apply part of the
evidence to the one day and part to the other. The joining

Argument. of two offences in this way is fatal, as is expressly held in *Hamilton v. Walker*, [1892] 2 Q. B. 25, relied on in the Court below and not successfully distinguished. As soon as any evidence was given of a sale on the 30th, evidence of a sale on any other day was not properly admissible, and having been admitted the conviction is bad: *Pacaud v. Roy*, 15 L. C. Reports 205. Then two convictions have been returned, and it is impossible to say which should be relied on, and both should now be quashed. Even if, however, the Crown is entitled to rely on the second conviction, that on its face is invalid as it directs imprisonment in default of payment without making any provision for levying the fine and costs by distress. Moreover, the evidence and proceedings shew that an adjournment of more than eight days took place, contrary to the express prohibition of section 857 of the Criminal Code, 1892. It is true that at the time the defendant did not object to this adjournment, but there cannot be waiver of this express provision of the Act: *Regina v. French*, 13 O. R. 80.

J. R. Cartwright, Q. C., in reply. The provision as to adjournment is a mere matter of procedure, and the defendant not having objected cannot now complain: *Regina v. Heffernan*, 13 O. R. 616.

October 27th, 1893. HAGARTY, C. J. O.:—

In *Regina v. Justices of Carrick-on-Suir*, 16 Cox C.C. 571, Lord Morris says: "But whether the summons was good or bad, I imagine that it is now law sufficiently well established that a person who appears in answer to a summons, and takes his trial and his chance of acquittal, is considered as having waived any objection to the summons."

The defendant there had forcibly left the Court after the evidence for the Crown was closed. A warrant was then issued for his arrest, and the Court was adjourned to the following day. Defendant did not appear when called, and sentence of imprisonment was awarded.

The full Court of four Judges held all the proceedings regular on motion to set aside. Judgment.

In Paley, 6th ed., pp. 94 and 103, the point of waiver by appearance is fully stated. HAGARTY,
C.J.O.

Onley v. Gee, 7 Jur. N. S. 570, 30 L. J. M. C. 222, 4 L. T. N. S. 338, is an important authority bearing on this question.

An information for keeping a betting house was held good charging the offence as the 5th October and the 8th November.

Wightman, J., held that section 1 of 11 & 12 Vic. ch. 43. (Jervis's Act), curing defects in form or substance applied, and adds: "Although the information lays the offence on the 5th October, and on divers other days and times, it is still well laid."

That statute contained the same direction as ours that the complaint should be for one offence and not for two or more matters of complaint.

I am not prepared to admit that the information must be read as necessarily charging two distinct offences. The offence substantially charged is a sale of liquor within thirty days—*scilicet* on 30th and 31st July.

If necessarily distinct offences, then it would seem that the sale on the second day if proved in addition would warrant a conviction as for a second offence under the statute. This, I think, would be wholly opposed to the intent and scope of the Act.

In *Regina v. White*, 21 C. P. 354, the Court commented very adversely on such a course of proceeding.

If the actual day of commission were material there might be great difficulty in fixing it certainly by the evidence. We can easily conceive a case where witnesses might prove distinctly a sale, but honestly differed as to whether it was the 30th or 31st, but clearly within the thirty days.

For myself, although I think a day is proper to be named, I cannot look upon the information as necessarily bad or as shewing two distinct offences.

Judgment.

HAGARTY,
C.J.O.

When the defendant appears with counsel, and enters on his defence without any objection, it seems to me there is an end of the objection here urged. In the exercise of its general supervising power the Court would interfere to set aside a conviction if it either set out two convictions on the same information, or against defendant's objections, and to his manifest prejudice, it was shewn that several distinct charges were blended together in somewhat the fashion of *Walker v. Hamilton*, [1892] 2 Q. B. 25, where breaches of two distinct sections of the Act were tried together on different informations.

Nothing of the kind occurred here. The magistrate's note of his finding at the close of the evidence clearly shews that one and only one violation of the law was in issue and found by him against defendant, the sentence being appropriate only to a first and single offence.

I am unwilling to assume a detriment to defendant which seems never to have occurred to her or her counsel.

There is much force in the judgments of Hawkins, and Wills, JJ., in *Rodgers v. Richards*, [1892] 1 Q. B. 555, as to the general law and the course proper to be pursued. I do not see that *Hamilton v. Walker* necessarily interferes with those judgments.

Until the motion in the Queen's Bench against the conviction nothing appears as to this objection to the information.

I do not think the objection as to adjournment beyond eight days can now prevail.

The objection appears to have been discussed at the first hearing, and the magistrate seems to have been aware of the law on this head. If illegal, the defendant was not bound to attend at the time of adjournment. But she did attend and went fully into her defence by witnesses, taking her chance of acquittal.

I am of opinion it is too late now to interfere on this ground.

The limit prescribed by law was, we may assume, to prevent remands of defendants beyond a reasonable time,

and when such limit is exceeded there is a remedy in the defendant's hands.

Judgment.

HAGARTY,
C.J.O.

I think on the whole we must allow the appeal. It is not a case for costs.

BOYD, C.:—

As the information is drawn I do not read it as containing a charge of two distinct offences in contravention of section 26 of the Summary Convictions Act; Criminal Code, 1892, sec. 845 (3). The offence is single, viz., that of selling liquor without license within thirty days before the date of the information. The days on which the offence was committed are alleged under a videlicet, "to wit, on the 30th and 31st days of July, 1892," so that evidence of selling on either day, or on both, would be sufficient to support the charge. The informer does not seek to sever the offence by laying it first on one day and then again on such another day, all that he proposes is to shew illegal selling within the thirty days: *Onley v. Gee*, 30 L. J. M. C. 222, and sec. 28, sub-sec. 2 of the Summary Convictions Act; Criminal Code, 1892, sec. 847 (2).

But if there were two offences charged this is a matter amendable or to be cured under various provisions relating to "defects in substance": sec. 28, sub-sec. 1, and sec. 79 Summary Convictions Act; Criminal Code, 1892, secs. 847 (1), 882, also sec. 105, sub-sec. 1 of the Liquor License Act. That such a duplicity is a defect of substance within the meaning of the Summary Convictions Act is decided in *Rodgers v. Richards*, [1892] 1 Q. B. 555, and I am content to follow here such judges as Hawkins, and Wills, JJ. I do not read this case as at all interfered with by *Hamilton v. Walker*, [1892] 2 Q. B. 25, which decides that where there are two distinct informations the magistrates cannot proceed with the second before disposing of the first. The different matters decided in these two cases are well brought out in the last edition (7th) of Paley, pp. 85 and 164.

Judgment.

BORN, C.

Of the other matters discussed only two seem of sufficient importance to be specially referred to. Though in the minutes of adjudication the remedy by way of distress is mentioned, the Justice was right in omitting this from the conviction: See *Regina v. Hartley*, 20 O. R. 481, and 53 Vic. ch. 37, sec. 27 (D.), amending sec. 87 of the Summary Convictions Act; Criminal Code, 1892, sec. 889.

As to the adjournment for over eight days it was directed at the request and for the benefit of the defendant, who attended thereafter and gave exculpatory evidence. This was tantamount to a submission to the jurisdiction of the magistrate in a matter of procedure which it is competent for a party to waive: *Regina v. Heffernan*, 13 O. R. 616, a case mentioned with approval in *Ex parte Welsh*, 28 N. B. 214. See also *Regina v. Justices of Carrick-on-Suir*, 16 Cox C. C. 571.

I think that the appeal should succeed, and that the conviction should be upheld.

OSLER, J. A.:—

The information in this case is in direct contravention of the 26th section of the Summary Convictions Act, R. S. C. ch. 178; Criminal Code, 1892, sec. 845, sub-sec. 3, which enacts that "Every information shall be for one offence only and not for two or more offences." It charges that the defendant within the space of thirty days past, to wit, on the 30th and 31st days of July, 1892, did unlawfully sell intoxicating liquor without the license therefor by law required.

The offence of selling liquor without license is not one which requires to be made out by proof of more than one act or of acts done upon different occasions, as for example, the offence of keeping a common gaming house: *Onley v. Gee*, 9 W. R. 662; or keeping open an unlicensed house: *Garrett v. Messenger*, L. R. 2 C. P. 583. Each separate sale of liquor constitutes a several offence, even though committed on the same day: Liquor License Act, R. S. O. ch. 194,

sec. 101, sub-sec. 4, and may be the subject of a several conviction, though not necessarily for the increased penalty: sec. 101, sub-secs. 3, 4. The form of information given in the Act requires the day to be mentioned, and though I concede that for the purpose of proof and conviction the day alleged in the information, where one day is charged, may be immaterial, yet where the information expressly charges the commission of an offence against the Act on two different days, the plain meaning of the words is that the defendant sold without license on each of those days. The scilicet only makes the intention clear, shewing that two illegal sales and not one only are intended to be charged. On such an information as this, prior to the alteration in law which required an information to be for one offence only, it seems clear that the defendant might have been convicted for distinct offences and penalties: *Rex. v. Swallow*, 8 T. R. 284. And in *Paley*, 7th ed., p. 208, it is said: "If distinct and complete acts are committed on different days, such as the killing game on each day, it is clear that the offences are distinct and subject to separate penalties." And in *Milnes v. Bale*, L. R. 10 C. P. 591, at p. 595, Lord Esher says: "I cannot find that in any case in which each act done was a complete offence in itself, and in which it would have been inadmissible to give other acts in proof of the committal of the same offence, it was held that several penalties could not be inflicted."

See also 1 Oke's Magisterial Synopsis (1868), p. 114; Stone's Justices' Manual, 23rd ed., p. 30. And it is only necessary to observe what took place before the magistrate in the present case to see that he conceived himself warranted under this information in receiving evidence of two distinct and separate sales occurring on different days and under wholly different circumstances.

There may be a doubt as to when the particular sale, the subject of a prosecution, took place, but the evidence must be directed to proof of one sale not of two.

It is, however, of little consequence to pursue this objection, and I should not have said so much about it were it

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

not that I think magistrates ought, even in these liquor license prosecutions, to take more pains to observe the forms and requirements of the law.

In trying an information for an unlawful selling on one day it is manifestly unjust to the accused to receive evidence of an unlawful sale on another day, and if the defendant had here taken the objection and the magistrate had persisted in entering upon the enquiry as to the sale on the 31st July, I have no doubt that a conviction made under such circumstances ought to be set aside as being in contravention of the plainest principles of justice. Here, however, the defendant does not seem to have thought she would be prejudiced by the course taken. She made no objection before the magistrate, who heard the evidence on both charges and has returned a conviction valid in form for the sale on the 31st July. The weight of authority is in favour of holding that the duplicity of the information was a defect of substance or of form of which the defendant cannot now take advantage by attacking the conviction: R. S. C. ch. 178, sec. 28; Criminal Code, 1892, sec. 847, sub-sec. 1.

Had I looked at the case apart from authority, I confess I should have been inclined to agree with the learned Chief Justice of the Queen's Bench, and to have held the objection not within the curative section. The information is not defective either in substance or in form. It is simply one which the Act says shall not be laid, and it seems senseless to say in one section that the information shall be thus, and in the next that no objection shall be allowed to it if it be not thus. But the cases of *Onley v. Gee*, (1861) (best reported in) 9 W. R. 662; *Rodgers v. Richards*, [1892] 1 Q. B. 555; and *Bartholomew v. Wiseman*, 8 Times L. R. 147, per Coleridge, C. J., and A. L. Smith, L. J., are directly in point, and hold that such an information is cured by the corresponding section of Jervis's Act: 11 & 12 Vic. ch. 43, sec. 1; Paley on Convictions, 7th ed., p. 85.

I cannot regard the case of *Hamilton v. Walker*,

[1892] 2 Q. B. 25, as opposed to these authorities. There the magistrates having two informations before them for what was in substance the same offence, heard the evidence as to both, the facts being the same, trying the second before they had disposed of the first and thus deprived the defendant of the right of setting up the defence that he had already been either convicted or acquitted, as the case might be, on the same facts. It is true that the Court also say that though the case did not come within the letter of section 10 of Jervis's Act (R. S. C. ch. 178, sec. 26) yet that it was within the spirit of the well known principle of the criminal law that each case ought to stand on its own merits, and should be decided on the evidence given with relation to the particular charge. In our case the evidence was taken without objection, and the conviction was necessarily for one offence only, to which the evidence for the other could not apply, and in the absence of objection we ought not to assume against the conviction that the defendant was prejudiced, or that the magistrate was influenced in finding the offence on the 31st proved by anything that was said by the witnesses as to the offence on the 30th.

Judgment.

OSLER,
J.A.

I may add as regards the reception of the evidence that as two charges were being proceeded with, though irregularly, before the magistrate, the conviction and proceedings are not open to the objection that improper evidence was admitted upon either of them so as to bring the case within the recent decision of *Regina v. Gibson*, 18 Q. B. D. 557. The magistrate has simply heard the evidence on each charge and convicted on one.

A further objection to the conviction pressed upon us, though not in the Court below, is that the hearing was adjourned from the 25th August to the 3rd September, a period of more than eight days, contrary to the provisions of R. S. C. ch. 178, sec. 48; Criminal Code, 1892, sec. 857.

There is a conflict of evidence as to whether this took place at the request of the defendant or not, but at all events he appeared again in answer to the charges at the

Judgment.

OSLER,
J.A.

time and place fixed for the adjourned hearing, and entered upon his defence. This, I think, was a mere matter of procedure, and the defendant having so appeared and continued the proceedings, the conviction is not vitiated by the fact of the delay having been for a longer period than the Act authorized. It is apparent that the enquiry on the 3rd September related to the charges mentioned in the information, which were the subject of the first hearing, and if, as is now well settled, the appearance before justices and allowing a charge to be proceeded with without objection will, as a general rule, waive the want of an information or summons, the appearance upon an adjournment, even though an irregular adjournment, of a hearing commenced by information and summons must *a fortiori* be a waiver of objections to the irregularity. I refer to *Regina v. Shaw*, 10 Cox C. C. 66; *Regina v. Justices of Carrick-on-Suir*, 16 Cox C. C. 571, 573; *Ex parte Daisy Hopkins*, 17 Cox C. C. 444, at pp. 470, 471; *Turner v. Postmaster General*, 34 L. J. M. C. 10.

It is no objection to the conviction that it directs imprisonment in default of payment, saying nothing of distress. It follows in this respect the express direction of section 70 of the Liquor License Act, which does not require that a distress warrant shall issue before imprisonment is inflicted for non-payment. The 88th section of the Act, which is now repealed by 56 Vic. ch. 56, sec. 10, was never held to make the award of distress necessary in case of penalties imposed under section 70, for the reason that by that section it was "otherwise provided": *Regina v. Smith*, 46 U. C. R. 442; *Regina v. Hartley*, 20 O. R. 481.

I am obliged to concur in allowing the appeal. But the defendant having once been acquitted and discharged by the judgment of a competent Court, and the proceedings before the magistrate having been most irregularly conducted, I think that if the Crown regard the matter as of such extreme importance that it ought to be pressed further, there should be no costs.

MACLENNAN, J. A. :—

Judgment.

MACLENNAN,
J. A.

I agree with my brother Osler that this information must be regarded as charging two offences; but in other respects I agree with the conclusions of the other members of the Court.

Appeal allowed without costs.

YOUNG V. SAYLOR.

Contempt of Court—Justice of the Peace.

THIS was an appeal by the defendant from the judgment of the Queen's Bench Division, reported 23 O. R. 513, and was argued before HAGARTY, C. J. O., BOYD, C., OSLER, and MACLENNAN, JJ.A., on the 21st of November, 1893. Statement.

Clute, Q. C., for the appellant.

Aylesworth, Q. C., for the respondent.

At the conclusion of the argument the appeal was dismissed with costs, the court holding that a Justice of the Peace has not absolute immunity under the facts set up in this case, and that the action was properly sent back to be fully tried.

HENDERSON V. BANK OF HAMILTON.

Jurisdiction—Redemption—Action—Foreign Lands.

A creditor who has recovered judgment in Manitoba, and who has by virtue of an Act of that Province a lien on the lands of the judgment debtor there, cannot maintain in the Courts of Ontario an action against a mortgagee, for redemption of a mortgage on lands in Manitoba, which are subject to the lien.

Judgment of the Queen's Bench Division, 23 O. R. 327, reversed.

Statement. THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 23 O. R. 327.

The plaintiff, who resided in the Province of Ontario, recovered judgment against one Lillico in the Province of Manitoba, and registered a certificate of that judgment against certain lands in that Province of which Lillico was the owner. This was done under Consolidated Statutes of Manitoba, ch. 37, sec. 83, which provides for the registration of a certificate of judgment, and enacts that "from the time of the recording of the same, the said judgment shall bind and form a lien and charge on all the estate and interest aforesaid in the lands of the judgment defendant in the several registration divisions in the registry offices of which such certificate is recorded, the same as though charged in writing by the defendant under his hand and seal." Lillico formerly lived in the Province of Ontario, but at the time of this action was living at the city of Seattle, in Washington Territory. The defendants, a bank duly incorporated by Act of the Parliament of Canada, having their head office in the city of Hamilton, in the Province of Ontario, were the holders of certain transfers made by Lillico charging the lands in Manitoba with payment of his indebtedness to the Bank, and after the recovery by the plaintiff of the judgment and the registration of the certificate he brought this action in this Province against the Bank and Lillico, alleging that he was a judgment creditor of Lillico and had registered his judg-

ment against the lands in the Province of Manitoba, Statement. and that there was nothing due to the Bank, and he asked that the Bank might be ordered to re-transfer the lands to Lillico. In the alternative, he asked that the Bank might be declared mortgagees only; and that a reference might be directed to take the accounts between the Bank and Lillico. He also asked a declaration that his judgment was a lien upon the lands and prayed that it might be enforced by way of equitable execution; and also that the lands might be sold and the proceeds applied in payment of his claim, with interest and costs; and such further relief as the nature of the case might require. The defendants contended, in addition to other defences, that the action could not be maintained in this Province.

The action was tried at Stratford at the Spring Assizes of 1892, before ARMOUR, C. J., who afterwards delivered judgment dismissing the action on the ground that the plaintiff had no right to maintain it, but this judgment was reversed by the Divisional Court who held that the bank were mortgagees, and directed redemption. At the trial there was no formal proof of the Manitoba law, but the Statutes of that Province were referred to. It was shewn that there were other execution creditors of Lillico in Manitoba.

The defendants then appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ.A., and MEREDITH, J., on the 28th of September, 1893.

Aylesworth, Q.C., for the appellants. Under Consolidated Rules 362 and 363 if default be made in redemption the defendant is entitled to foreclosure, that is, a redemption action is simply a foreclosure action with the parties reversed. If, therefore, there could not be in the present case foreclosure at the instance of the defendants there cannot be redemption at the instance of the plaintiff. That foreclosure could not be granted is plain, because

Argument. there are other creditors having executions in Manitoba who cannot be forced to submit themselves to the jurisdiction of the Courts of this Province. It has been held that a mortgage of foreign lands may be foreclosed: *Bent v. Young*, 9 Sim. 180; *Beckford v. Kemble*, 1 S. & S. 7, and in the latter case it seems to be recognized that redemption might also be decreed, though there is no direct authority to that effect. But at most, such relief will be afforded only where there is a direct contract, or where trust or fraud is made out. Here the plaintiff has at best a mere equity founded on a foreign Act, and extra-territorial effect cannot be given to this: *Norris v. Chambres*, 29 Beav. 246; 3 D. F. & J. 583; *Cookney v. Anderson*, 31 Beav. 452; *Penn v. Lord Baltimore*, 2 W. & T. L. C., 6th ed., p. 1047; *Strange v. Radford*, 15 O. R. 145; *Companhia de Mocambique v. British South Africa Company*, [1892] 2 Q. B. 358.*

J. P. Mabee, and *R. T. Harding*, for the respondents. All the creditors having judgments in Manitoba live in this Province, so that there would be in fact no difficulty in working out a redemption or foreclosure decree. The plaintiff is not endeavouring to have any effect given to his Manitoba judgment in this Province, but simply seeks to enforce the rights which, as mortgagee by virtue of the Manitoba Act, he in fact has against the prior mortgagees. The Manitoba land is not in question, but all that is asked is that a personal equity against the Bank may be enforced.

Aylesworth, Q.C., in reply.

November 14th, 1893. The judgment of the Court was delivered by

OSLER, J.A.:—

In my opinion the plaintiff's case cannot be put upon higher ground than if he were attempting to obtain a decree of foreclosure against Lillico in respect of the so called mortgage or charge created by the registration of his

* Reversed in the House of Lords: [1893] A. C. 602.—*REP.*

Judgment.

ONLIER,
J.A.

judgment, because it is only that which could give him the right to redeem the defendants as first mortgagees. It is needless to say that the foreign judgment itself will support no such action as the present in the courts of this country, and therefore it is necessary to consider the nature of the charge created by its registration. Before doing so, however, it is well to recall the principle on which the court entertains actions of redemption or foreclosure, or other actions concerning mortgages of foreign lands. In *Ewing v. Orr-Ewing*, 9 App. Cas. 54, at p. 40, Lord Selborne said: "The Courts of Equity in England are, and always have been, courts of conscience, operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction."

In *Norris v. Chambres*, 29 Beav. 246, affirmed, 3 D. F. & J. 583, an action to enforce or declare a vendor's lien upon real property of the defendants out of the jurisdiction of the Court, Lord Romilly, M. R., said: "I am referred, in support of this demand, to the case of *Penn v. Lord Baltimore*, and that class of cases, which establishes that, when a plaintiff in England has an equitable money demand against a defendant also residing here, this demand will be enforced, not merely against the defendant personally, but, if the circumstances of the contract or dealings between the parties justify it, by the declaration of a lien against the real property of that defendant out of the jurisdiction of the court. These cases have certainly, as Mr. Justice Story observes, gone to the full extent of the assertion of the jurisdiction of this Court, and they are always encumbered with this difficulty, that the declaration of this decree may be a mere *brutum fulmen*, incapable of being practically enforced against the defendant. I am not disposed, however, to go a step further than those cases warrant and demand. On examining them I find that in all of them a privity existed between the

Judgment.

OSLER,
J.A.

plaintiff and the defendant. They had entered into some contract or some personal obligation had been incurred moving directly from one to the other. In this case I cannot find that anything of this sort exists."

In *Paget v. Ede*, L. R. 18 Eq. 118, Bacon, V. C., made a foreclosure decree, being a decree *in personam*, depriving an English mortgagor of his right to redeem a mortgage of land in one of the colonies, resting the jurisdiction of the court upon its right to enforce the personal contract created by the mortgage.

In *Companhia de Mocambique v. British South Africa Company*, [1892] 2 Q. B. 358, at p. 404, Lord Esher, M. R., speaks of the jurisdiction as exercised upon the ground of a contract or an equity between the parties. He evidently doubts, as did his predecessor, whether the cases had not gone too far in assuming jurisdiction even on that ground. See also *In re Hawthorne, Graham v. Massey*, 23 Ch. D. 743; *Batthyany v. Walford*, 33 Ch. D. 624; *Whitaker v. Forbes*, L. R. 10 C. P. 583, 585.

From these cases and many others which might be cited it will be seen that the jurisdiction of the court, in such cases as the one before us, is founded upon the existence of some contractual obligation express or implied, or some trust or equity between the parties, which the court, acting *in personam*, and upon the conscience of the party affected by it, will enforce in that manner.

Now, as between the plaintiff and Lillico there is as regards the charge upon the land neither privity of contract nor any equitable obligation or trust. It is a statutory charge created *in invitum* upon lands in the foreign state by the registration of the foreign judgment, and the right resulting from it must be enforced by the courts of that state. And although the statute declares that the estate of Lillico is bound "the same as though charged in writing by him under his hand and seal," this cannot have the effect of creating a contract or establishing a privity of obligation between him and his judgment creditor. It is no more than a declaration of the effect of

the registration, and gives the plaintiff no *locus standi* in the courts of this Province to enforce it *in personam* against Lillico by foreclosing his interest in the land in default of payment of the judgment. *A fortiori*, therefore, it would seem to give the plaintiff no right to compel the defendants to account to him here in respect of Lillico's mortgage to them, and to submit to redemption of their security. Outside of the foreign state there is no one who is affected by the charge or capable of being sued in respect of it as regards any personal obligation to pay it.

Judgment.

OSLER,
J.A.

It is, as I have said, simply a statutory charge to be enforced under the law of the state which imposed it, and confers no status upon its holder in the courts of any other country. We should be going in direct opposition, in my opinion, to the authorities I have referred to, were we to uphold this judgment, which gives the plaintiff a right to an account and redemption, refusing the defendants the complementary relief of foreclosure, and leaving them just where they are if the plaintiff does not redeem, and making no effectual provision, simply because that could not be done, for taking accounts of the claims of other creditors. Nothing more unequal or inconvenient can well be imagined. With all respect, therefore, to the court below, I think we should reverse the judgment appealed from and dismiss the action with costs throughout.

Appeal allowed with costs.

WETTLAUER V. SCOTT.

*Sale of Goods—Conditional Sale—Bills of Sale and Chattel Mortgages—51
Vic. ch. 19 (O.).*

The lien of an unpaid vendor of a manufactured article is not invalidated if, without his direction or connivance, the purchaser paints out or obliterates the name and address of the vendor that were, pursuant to the Conditional Sales' Act, 51 Vic. ch. 19 (O.), properly marked on the article at the time of the conditional sale.

Semble : The instrument set out below in the form of a promissory note with conditions thereunder written is an instrument evidencing a conditional sale within the first and sixth sections of that Act.
Judgment of the County Court of Perth reversed.

Statement. THIS was an appeal by the plaintiff from the judgment of the County Court of Perth.

The action was brought to recover damages for the conversion of a waggon and pair of bob-sleighs, and was tried at Perth before Woods, Co. J., and a jury, in June, 1892.

The plaintiff, who had acted as agent for the sale of agricultural implements, sold the articles in question to one Simpson on the 6th of October, 1891, taking two notes, in the following form, for the price :

WOODSTOCK, Ont., October 6, 1890.

"On or before the first day of July, 1891, for value received, I promise to pay to George Wettlaufer or bearer, at their (*sic.*) office in Stratford, the sum of sixty-eight dollars with interest at per cent. per annum till due, and one per cent. interest per month after due until paid.

I further agree to furnish security, satisfactory to you, at any time, if required. If I fail to furnish such security when demanded, or if I make any default in payment, or should I dispose of my landed property, you may then declare the whole price due and payable, and suit therefor may be immediately entered, tried, and finally disposed of in the court having jurisdiction where the head office of G. Wettlaufer is located; and you may retake possession of the machine without process of law, and sell it by public

or private sale, to pay the unpaid balance of the price, Statement. whether due or not; but the taking and selling of said machine shall not relieve me of my liability for any balance of the purchase price still unpaid after such sale. Subject to the aforesaid provisions I am to have possession and use of the machine at my own risk of damage or destruction from any cause whatever, but the title thereto is not to pass to me until full payment of the price or any obligation given therefor. These conditions and agreements are to continue in force until the full payment of the price and interest is made.

I hereby acknowledge having this day received a copy of this note.

(Sgd.) D. M. SIMPSON."

The second note was for \$67, payable on or before the first day of January, 1892.

The forms used were printed ones furnished to the plaintiff by his employers for use in the sale of agricultural implements.

The waggon and bob-sleighs had been specially made for the plaintiff and on the waggon at the time of the sale were, as found by the jury, some advertising devices and his name and address. After the bargain was made the waggon was taken to a waggon maker's for repairs and while there the plaintiff's name and address were painted out. Simpson afterwards mortgaged the articles in question, with other articles, to the defendant, and default having been made in payment of the mortgage moneys the defendant, with notice of the plaintiff's alleged lien, sold them.

A great deal of contradictory evidence was given, but for the purposes of this report it is sufficient to state the findings of the jury, which were as follows :

Was the name Geo. Wettlaufer or G. Wettlaufer painted, printed, etc., on the left hand panel at the rear of the box of the waggon or elsewhere thereon at the time of the sale to Simpson ?

Were the words "Stratford, Ont." painted, printed, etc.,

Statement. on the door or elsewhere on the box at the time of the sale to Simpson? According to the evidence we believe the name was there.

Did the plaintiff know when or on the day the purchase was made that Simpson was about to get the waggon painted immediately at Cleland and Baker's shop? Yes.

If he did did he take any steps to procure his name and address, if such were on the waggon, to be preserved or not painted over? No.

Did Simpson inform the defendant when he executed the chattel mortgage on the 3rd March, 1891, covering the waggon, etc., that it was subject to a lien to the plaintiff or any one else for unpaid purchase money? No.

If no, was the defendant afterwards informed of the alleged lien? We don't think he was.

Were the words "Dr. Jug" painted on the door at the rear of the box of the waggon? Yes, on the jug.

If you find the first two questions and the seventh in the affirmative do you find that the words were so painted that it would be conveyed to the public that "Geo. Wettlaufer," and "Stratford, Ont." should read together or that the words "Stratford, Ont." should be read with "Dr. Jug"?

In other words, would the words be naturally read "Dr. Jug, Stratford, Ont.," or "G. Wettlaufer, Stratford, Ont."? "G. Wettlaufer, Stratford, Ont."

What is the value of the rig leaving out of view the bob-sleighs? \$140.

What is the value of the bob-sleighs? \$25.

Was the name and address of the plaintiff painted printed on or otherwise plainly attached to the waggon at the time of the sale to Simpson? We believe it was.

Did the plaintiff tell Scott, the defendant, when in Listowel, on the occasion of his demanding the waggon and sleighs, that his name and address or name or address were not on the waggon? No.

The jury upon being questioned, said that they intended their answer to the first two questions to be in the affir-

mative, that both the name "G. Wettlaufer" and "Strat- Statement.
ford, Ont.," were painted on the rear of the waggon.

Upon these findings, judgment was entered in favour of the plaintiff for \$25, the value of the bob-sleighs, with Division Court costs, the learned Judge holding that these bob-sleighs were not included in the chattel mortgage, but as to the waggon the action was dismissed.

The plaintiff moved in term for an order setting aside that portion of the judgment dismissing the action, and for an order directing judgment to be entered for him for the sum of \$140 in addition to the \$25 allowed, and in the alternative for a new trial. Judgment was given on the 22nd of May, 1893, refusing to enter judgment for the plaintiff, but ordering a new trial and reserving the costs of the first trial. The learned Judge thought that questions three and four should have been supplemented by another question to ascertain whether or not there had been collusion between Wettlaufer and Simpson, in regard to the painting out of the name and address, and he stated that he had assumed in view of the answers to the other questions that collusion existed. He also thought that the jury should have been asked to find whether change of possession took place before or after the painting.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ.A., on the 13th and 14th of September, 1893.

J. P. Mabee, for the appellant.

Idington, Q. C., for the respondent.

October 27th, 1893. HAGARTY, C. J. O. :—

Even if the defendant can clearly establish that the document signed by Simpson is within the statute, I am of opinion that his defence fails.

Assuming it to be within the Act, which I incline to think it is, the plaintiff is entitled to the benefit of section

Judgment.

HAGARTY,
C.J.O.

1, which declares that the lien, as it is called, shall be valid when the goods or chattels at the time possession is given to the bailee or vendor have the name and address of the vendor painted thereon, or otherwise plainly attached thereto. That the name and address were so painted is, I think, proved, and is so found by the jury.

A large amount of time was spent in discussing before us the words "at the time possession was given." I cannot see the importance of this attempted distinction between the actual sale and the giving of possession. The jury found the words of ownership and residence were there at the time of sale.

The waggon was taken—it matters little by whom, but at all events by the owner's leave and direction—to the paint shop, and there was in the vendee's undoubted possession, and the vendor's name, etc., was there unless and until the vendee had it painted out.

It was found by the jury that the plaintiff was aware that Simpson was about to get the waggon painted at the paint shop, and they also found that he did not take any steps to procure his name and address to be preserved or not painted over.

On this evidence and finding I think the plaintiff is not barred from recovering by anything in the statute.

His knowledge that the conditional purchaser was about getting the waggon painted cannot, as I consider, be changed into an assertion that his name, etc., was not there when possession was delivered, as provided by statute.

He was not to know that painting a second hand waggon necessarily involved the obliteration of his name, nor could he be answerable that the vendee might by painting it otherwise erase his name, etc.

The statute must be construed with reasonably close adherence to the language used. It may probably call for amendment to make it more effectual.

On the finding of the jury I think the plaintiff was entitled to a verdict for the full amount of the values of the articles.

The learned Judge directed a new trial for the apparent purpose of having it submitted to another jury whether or not there was collusion between the plaintiff and Simpson in the matter of having the name and address painted out. He said he had from the findings erroneously assumed such collusion.

Judgment.

HAGARTY,
C.J.O.

We naturally feel much surprise that a case like this should have occupied four days in the trial, resulting in an appeal book of four hundred pages with the evidence relevant and irrelevant of over thirty witnesses.

It is a matter of much regret that such an enormous amount of costs, wholly disproportioned to the value of the subject matter in dispute, should have been thus incurred.

During this protracted trial there was no attempt to prove any such collusion, neither was it asserted in the long argument before us that any such defence was raised.

We think it is out of the question to prolong this unfortunate litigation for the purpose of attempting to prove a defence not before thought of or suggested. The parties ought to be left to the case as it was elaborated on either side in this protracted four days' trial.

If there were such a defence why was it not urged, or why should another costly trial be ordered to try whether there was ground for urging it, or whether if proved it would be a defence under this statute?

We think that the learned Judge erred in his order for a new trial, and that the case must be left as it stood on the trial.

The plaintiff's motion to enter judgment for the additional item of \$140 should be made absolute, and judgment be entered for \$165, with costs of suit and costs of motion.

OSLER, J. A.:—

Reading together the 1st and 6th sections of the Act respecting Conditional Sales of Chattels, 51 Vic. ch. 19 (O.), I incline to the opinion that the agreement between the

Judgment.

OSLER,
J.A.

plaintiff and Simpson in respect of the waggon which is the subject of this suit was an instrument evidencing a conditional sale of the waggon within the meaning of the Act, and required registration in the County Court office as against *bond fide* purchasers from Simpson, unless the name and address of the vendor were upon the waggon at the time possession was given by him to the bailee Simpson.

Having regard to the evidence and the course taken at the trial I think the answers of the jury to the first and second questions must be taken as determining that the plaintiff's name and address were upon the waggon at the time it came into Simpson's control and possession, which occurred immediately following the bargain between the parties as evidenced by the sale or lien notes. The language of the question is "at the time of the sale to Simpson" but as it is manifest from the evidence that Simpson at once gave directions, which were carried out, for removing the waggon from the place where it then was to the place where he was going to have it painted, and no change in the form of the question was suggested, I think the answer ought to be read as covering the case and as treating the sale and change of possession as being, what there seems no reason to doubt they substantially were, contemporaneous.

The plaintiff's name and address then having been on the waggon when it came into Simpson's possession, the statute is complied with. The former cannot be deprived of his rights because the latter proceeded to paint the name over and obliterate it. There is no finding, nor any evidence to warrant it if there were, that the plaintiff knew or intended that in painting the waggon his name should be painted out. Nor can it be said that any duty is by the Act cast upon the vendor to prevent the bailee from obliterating his name or to exercise any control over it in that respect during the bailment. The whole Act is a very loosely drawn, and will probably turn out to be a very ineffective, piece of legislation, and in framing any amendment of it

the draftsman would do well to note the provisions of the Imperial Factors' Amendment Act, 52 & 53 Vic. ch. 45. See also *Lee v. Butler*, [1893] 2 Q. B. 318.

Judgment.
OSLER,
J.A.

On the answers of the jury it seems to me that the plaintiff and not the defendant was entitled to judgment at the trial.

The learned Judge entered judgment for the defendant wrongly, as I think, and has now, instead of entering judgment for the plaintiff on the motion afterwards made in term, directed a new trial on the ground that the questions "should have been supplemented by another question pointing to ascertaining whether there was any collusion between Wettlaufer and Simpson in the matter of having the name and address painted out." He says he assumed that collusion from the findings, but on reflection thinks he ought not to have done so. We agree that the findings in answer to questions three and four, viz., that the plaintiff knew that Simpson was going to have the waggon painted, and took no steps to preserve his name from being painted over, would not justify that assumption. But we are also of opinion that this should have led the learned Judge to direct judgment for the plaintiff, instead of a new trial, since the evidence offers nothing on which, as we think, collusion could properly have been found by the jury, nor is fraud or collusion charged in the pleadings or suggested at the trial.

I have already said that the point as to change of possession is fairly covered by the answers of the jury, and the course taken at the trial, so that the other reason stated by the learned Judge for granting a new trial fails of effect. The case having been tried out at enormous length (thirty-three witnesses, a four days' trial, and an appeal book of 400 pages), a new trial ought not to have been granted unless it clearly appeared that some miscarriage had occurred which the justice of the case imperatively required to be set right. The plaintiff's case seems to me to have been well proved, to be sustained by the findings, and to demand a judgment on those findings in his favour for \$140

Judgment. in addition to the \$25 for which only he recovered at the trial.

**OSLER,
J.A.**

I think the appeal should be allowed, judgment in term reversed, and judgment at trial varied as above with costs throughout.

MACLENNAN, J. A. :—

I agree.

Appeal allowed with costs.

MCLEAN V. CLARK.

Partnership—Use of Name—Holding Out—Estoppel.

When a person, not in fact a partner, authorizes his name to be used in the firm name of a partnership there is a holding out of himself as a partner to any one who knows or has reason to believe that this represents the name of the person so authorizing its use, but a partnership by estoppel or by holding out will not be created if the real position of affairs is known to the creditor.

Judgment of the Common Pleas Division, 21 O. R. 683, reversed in part.

Statement. THIS was an appeal by the defendant James M. Clark from the judgment of the Common Pleas Division, reported 21 O. R. 683.

The plaintiffs, who were wholesale dry goods merchants carrying on business in the city of Montreal, brought the action against the appellant and one Peter Maitland, alleging that they were partners in a firm of Clark, Maitland & Co., to recover the sum of \$759.94, a balance due to the plaintiffs for goods supplied by them to the firm of Clark, Maitland & Co., between the 1st of July, 1887, and the 1st of February, 1889. Clark denied that he was or ever had been a member of the firm.

The action was tried at Perth at the Spring Assizes of 1891, before MACMAHON, J.

It appeared from the evidence that for some time previous Statement. to the month of May, 1887, the defendant Clark had been carrying on a general business in Smith's Falls. In May, 1887, he determined to separate the hardware portion of the business from the general business; and, in order to do so, he, on the 11th of May, 1887, entered into an agreement with his co-defendant Maitland, whereby he transferred all his general stock to Maitland, taking back from him a chattel mortgage securing \$10,000, payable in five years. The business continued to be carried on at the same premises as those in which Clark had previously transacted it. There was a partition in the shop whereby the space occupied by the hardware business was separated from that occupied by the general business, but in other respects the premises were occupied as before. The name "Clark, Maitland & Co.," was placed over the shop.

At the time the agreement was entered into, discussion arose as to the name under which Maitland was to carry on his business. He expressed a desire to use the defendant Clark's name. At first Clark objected, but subsequently he consented on the understanding that a certificate under the Partnership Act should be filed. A certificate stating that Maitland carried on and intended to carry on trade and business as a merchant and dealer in general merchandize in the town of Smith's Falls, under the name of Clark, Maitland & Co., and that no other person was associated with him in partnership, was registered on the 25th of January, 1888. The defendant Clark had had business transactions with the plaintiffs for some years, and, at the time the agreement with Maitland was made, was indebted to them in a considerable sum, but this indebtedness was afterwards paid.

In July, 1887, Mr. Mathews, a travelling agent of the plaintiffs, visited Smith's Falls, and after an interview with Clark, who introduced him to Maitland, obtained from Maitland an order for a considerable quantity of goods. These goods were by instructions from Maitland charged in the name of Clark, Maitland & Co. and after-

Statement. wards further goods were supplied to Clark, Maitland & Co. Clark was fully aware of the dealings between Maitland and the plaintiffs, and he never notified them that he had no longer any interest in the business. The account in the plaintiffs' books originally stood in the name of J. M. Clark, and was changed to the name of Clark, Maitland & Co., but how or by whose instructions that was done did not appear.

On the 10th of April, 1888, the plaintiffs wrote to Clark as follows:—

“DEAR SIR,—We enclose accounts of both firms now considerably overdue, and as it is difficult for us to give so much accommodation without the use of notes, we have again to ask you to favour us with the same.”

In that letter was enclosed an account shewing that up to the 18th December, the plaintiffs had supplied goods to Clark, Maitland & Co., amounting to \$1,106.31, and subsequently to that, between that and the date of the letter, \$204.19 more, making in all \$1,310.50.

In reply to this letter Clark wrote as follows:—

“DEAR SIR,—Yours with statements received, and in reply would say that I am very sorry that I have not been able to close up my account with you ere this, but I will send you a part of it next week. Regarding C. M. & Co., I thought they had sent you a remittance since you last rendered the account. I spoke to Mr. Maitland on receipt of your letter, and he will give the matter his attention.”

Again, on the 7th of May, 1888, the plaintiffs wrote to Clark as follows:—

“We again enclose monthly statements of account and will be pleased to receive a good remittance in course of mail.”

To this letter there was no answer; and on the 19th of June, 1888, they wrote again to Clark as follows:—

“DEAR SIR,—As we have only got one small remittance from you in a period of four months, and nothing from the firm, on accounts now considerably overdue, we feel that we are not getting our share of your cash receipts.”

In July, 1888, the plaintiffs, having seen an entry in the "mercantile change sheet" of renewal of a chattel mortgage made by Maitland to Clark, wrote to their agent Mathews as follows: Statement.

"We received from J. M. Clark \$200, and from Clark, Maitland & Co. \$300, and the latter promise to pay the balance within 30 days, which will be satisfactory if they do so, but I am doubtful. Robertson, L. & Co. have refused to sell them on account of the existing chattel mortgage. I hear the elder brother is quite poorly, and that the other lacks the ability to conduct the business properly, and should anything happen the elder, that J. M. C. would take back the business. Edgar, of McKay Brothers, told me that they were always under the impression he was a partner, and having done business with the family so long are surprised that he did not notify them. Now, while there, have a talk with J. M. C., and if there is any likelihood of his taking over the business, we certainly would like to continue the account. You might also find out how the new firm has done, and when they took stock and if the result was satisfactory to J. M. C."

Mathews did make inquiry, and gave the result in the following letter:

"I had quite a talk with J. M. C. about C. M. & Co. He sold them out the business at seventy cents on the dollar, and took a mortgage to secure himself. * * The eldest brother is quite well again, and has been at business since the 1st March or thereabouts, and I think they will get along now, of course Mr. Clark says that should they not succeed, he would take over the business again, but he don't think there is any danger of this happening.

"P. S.—Clark, Maitland & Co., are only going to buy stuff as they want it; one of them will be down about 1st September."

After July, 1888, other goods were furnished amounting to \$475.40. Clark, Maitland & Co., failed in February, 1889, and on the 12th of October, 1889, the plaintiffs received from their assignee the sum of \$621.78, and this action was brought to recover the balance of the account.

Statement.

On the 16th of May, 1891, MACMAHON, J., delivered judgment in favour of the plaintiffs, and on the 27th of February, 1892, this judgment was affirmed by the Divisional Court.

The defendant Clark appealed, and the appeal was argued on the 3rd of October, 1893, before HAGARTY, C. J. O., BOYD, C., and OSLER, and MACLENNAN, JJ. A.

Moss, Q. C., for the appellant. It is admitted that Clark was not in fact a partner in the firm of Clark, Maitland & Co., and there is not sufficient evidence that he held himself out as a partner, or allowed himself to be held out as a partner, to enable the plaintiffs to recover. Moreover, it has not been shewn that the plaintiffs gave credit to the firm of Clark, Maitland & Co. by reason of any representations made by Clark. The evidence is clear that on the 14th of July, 1888, the plaintiffs became aware that Clark was not a partner, and he certainly is not liable for any goods sold by them to Clark, Maitland & Co. after that date. It is true that Clark did not notify the plaintiffs that he was not a partner, but as they in fact knew that he was not a partner notice by him was not required, and their knowledge, no matter how acquired, of the fact prevents recovery by them. If, however, it can be considered that Clark should have given notice that he was not a partner in the firm of Clark, Maitland & Co., that duty was sufficiently discharged by the registration of the certificate in January, 1888, stating that the business was being carried on by Maitland alone, and also by the registration of the chattel mortgage from Maitland to Clark, shewing clearly that Clark had no connection with the new firm. To a great extent the judgment of the Court below has turned upon the fact that certain letters written by the plaintiffs to him implying that he was a partner in the firm, were not answered by him, but it is clear that there is no obligation to answer letters, or to repudiate unfounded allegations therein contained: *Rich-*

ards v. Gellatly, L. R. 7 C. P. 127 ; *Wiedemann v. Walpole*, *Argument*.
[1891] 2 Q. B. 534.

W. M. Douglas, for the respondents. The question is one of fact, whether the defendant Clark did or did not hold himself out, or permit himself to be held out as a partner in the firm of Clark, Maitland & Co. There is abundant evidence to shew that he did so hold himself out, and that the respondents gave credit to that firm relying upon the financial strength of the appellant. The correspondence between the parties is in itself quite sufficient to fix the appellant with this liability, and this conclusion is much strengthened by the oral representations made by the appellant to the plaintiffs' traveller. The registration of the certificate was not notice to the plaintiffs. They had no actual notice of this certificate, and even if, under any circumstances, it could be held to be constructive notice, still not having been filed for more than six months after the time that the firm name was adopted, it became of no effect at all.

Moss, Q. C., in reply.

October 27th, 1893. BOYD, C. :—

Prior to the 14th July, 1888, I think the judgment in appeal is right in holding the defendant Clark liable as a partner. He permitted his name to be used on the sign-board as a constituent of the firm, and he acted in the business as a partner might. The question of James, L. J., is pertinent: "If I go to a shop and find the name 'Thompson & Jones' on the door, and I go in and find Thompson and Jones selling goods, am I not warranted in believing that they are partners?": *Ex parte Hayman*, 8 Ch. D. 11, at p. 17.

But this partnership by estoppel or by "holding out" will not hold good to create the legal liability of partner if the real position of affairs is known to the creditor. The degree of notice required is not of such a character as is required to establish actual notice under the Registry

Judgment. Act. I think the judgment in review errs in seeking too conclusive proof, and in attributing insufficient notice to the admitted facts known to the plaintiff on the 14th July, 1888. In a text book of accuracy it is said : " If it can be proved that the party seeking to charge (the alleged partner) had notice of the real circumstances of the case, he will not be answerable : " p. 17, *Smith's Mercantile Law* (10th ed.), and again at p. 46 (speaking of the express notice which is usually required in the case of retiring partners to those who have dealt with the firm), it is said : " But if a fair presumption can be raised from other circumstances that the party had actual notice, that will be enough." The cases substantiate this statement of law, and I would refer particularly to what is said in *Barfoot v. Goodall*, 3 Camp. 147, and the case noted at the end of that report.

BORD, C.

The reading of the letters which passed between Stewart (a member of the plaintiff's firm) and their traveller Mathews, dated 14th and 16th July, 1888, leads very reasonably to the conclusion that the plaintiffs were informed of the real circumstances of Clark's relation with the firm of Clark, Maitland & Co. They were told that Clark had sold out his business at seventy cents on the dollar, and had taken a chattel mortgage to secure himself. Stewart writes, " I hear the elder brother (Maitland) is still quite poorly, and that the other (Maitland) lacks the ability to conduct the business properly, and should anything happen the elder that J. M. C. (Clark) would probably take back the business."

The traveller thus responds : " The eldest brother is quite well again, and has been at business since 1st March or thereabouts, and I think they will get along now, of course Mr. Clark says that should they not succeed, he would take over the business again." The principal writes, " have a talk with J. M. C., and if there is any likelihood of his taking over the business, we certainly would like to continue the account. You might also find out how the new firm has done and when they took stock, and if the result was satisfactory to J. M. C." It does not appear

that the traveller spoke to Clark categorically as to his being or not being a partner (according to the plaintiffs' evidence). Clark says he told Mathews that he was not a partner. But apart from this, I would infer from the correspondence between the plaintiffs and their agent, that all the circumstances were known to them, as to Clark having sold out the business, and of his intention to take it back again in case the "new firm" did not succeed. The fair and reasonable import of the information would be that Clark was then out of the business, but might resume his connection with it if the Maitland brothers failed to succeed. If he was a partner, there was no apparent pertinence in Stewart's anxiety for the state of the account, nor of his willingness to continue to deal if Clark was likely to take over the business.

Judgment.
BORN, C.

The circumstances were thus known, which were sufficient to put the plaintiffs on enquiry as to Clark's real position; what they did learn upon investigation, as disclosed by themselves, was sufficient to verify the entertained suspicion that Clark was not a partner; and if they abstained from going further, they cannot by the operation of the doctrine of estoppel, fix subsequent liability on a man who was not in fact a partner: *Young v. Tibbitts*, 32 Wisc. 79.

For the amount of goods supplied to the firm subsequently to July, 1888, I would allow the appeal; and as success is divided, no costs should be given in this Court, and in the Court below the costs should be on the appropriate scale on the reduced verdict.

OSLER, J. A. :—

I think there is some evidence that the plaintiffs believed from what they had seen and heard after Clark sold out his business to Maitland, that he was a partner in Clark, Maitland & Co., and that he was the Clark whose name appeared in that business name. The fact undoubtedly is that he agreed with Maitland that his name should be used,

Judgment.

OSLER,
J. A.

and that it was so used. I do not know on what principle the defendant can contend that this was not a holding out of himself as a partner in that firm to any one who knew or had reason to believe that this represented the name of the defendant, and not that of some other person. It was his name, in fact, that was used, and used with his assent, and the plaintiffs had reason to believe, from what they heard from their traveller, and from many surrounding circumstances, that he was the Clark in Clark, Maitland & Co. They say they did believe it, and believed that he was a partner. He was not so in fact, but there was a distinct holding out that he was, to any one who had reason to believe that he was the person whose name appeared in the above firm name. Therefore, for goods supplied by the plaintiffs before the middle of July, 1888, I think the defendant cannot escape responsibility. As to the account for goods furnished after the 14th July, the case is different. On that day they wrote a letter to their traveller Mathews, then at Smith's Falls, where the defendant resided and carried on business, and where the business of Clark, Maitland & Co., was also carried on, which bears internal evidence that the plaintiffs had then received information, probably from some of the persons mentioned in the letter, that Clark was not really a partner.

To my mind this letter is susceptible of only one interpretation, viz., that the writer knew, or had learned, that the defendant had sold out his business to the two brothers Maitland, and that he was not himself interested in it as partner.

If the plaintiffs then supposed he was still a partner, they would hardly have said they would like to continue the account if there was any likelihood of his taking over the business, for if he was a partner such a condition would be unnecessary and meaningless, as his liability as partner would be just as satisfactory. The distinction between having sold the business out and out and remaining in it as a partner is also very plain to the mind of the writer. Mathews, the traveller, answers the letter on the 16th July.

The plaintiffs, having said that if there was any likelihood of Clark taking over the business they would like to continue the account, are told that he had sold out the business, and that it was not likely he would have to take it back.

They, nevertheless, continue the account and increase their sales to "Clark, Maitland & Co." I think they cannot, after this, be heard to say that they believed the defendant was a partner by reason of his name being used in the business name of the firm. They then knew that Clark had sold the Maitlands the business, securing himself by a mortgage on the stock. There remained nothing but the use of his name; but these letters shew that they knew they could not any longer rely on this to make him liable to them, and therefore, that there was no holding out, which induced them to sell to Clark, Maitland & Co. on the faith of his being a partner. The reason they continued the account really was, judging from the correspondence, the satisfactory information they received from their traveller as to the prosperity of the business in the hands of the Maitlands, who were likely to carry it on so well that there was no probability of Clark having to redeem it.

I think, with great respect, that the judgment should be varied, and the plaintiffs' recovery limited to the goods sold previous to the 14th July, 1888.

MACLENNAN, J. A. :—

I am of opinion that as to goods supplied before the month of July, 1888, the appellant became liable to the plaintiffs on the ground of holding himself out as a partner.

Great stress was laid upon the fact of the sign over the door being Clark, Maitland & Co., but very little can be made of that, because the plaintiffs' agent Mathews says he did not see the sign until September, several months after the dealing began, and he does not say that he drew any inference from it, or that it influenced his mind in any

Judgment.

OSLER,
J.A.

Judgment. way. But the important circumstance is that the appellant deliberately acceded to Maitland's request to allow the use of his name for his firm, namely, the firm name of Clark, Maitland & Co. There could be but one object on Maitland's part in this request, and that object must have been quite apparent to the appellant. It could only have been in order to induce a belief that the appellant had still some connection with this business, which had theretofore been carried on by him. From that time Maitland began to do business in the firm name, and among others with the plaintiffs, who had previously done business with Clark.

**MACLENNAN,
J.A.**

I think it was most natural for the plaintiffs, and their traveller Mathews, to draw from this firm name the very inference which its use was intended to convey; and the evidence, although meagre, is, I think, sufficient to shew that they did draw that inference, and did for a time believe that the appellant was a partner. Mr. Stewart, one of the plaintiffs' firm, swears that up to July, 1888, he believed him to be so; and the circumstance of their enclosing their accounts against the firm to him, and asking for payment is strongly corroborative of his evidence. I think also we may infer that the plaintiffs' belief was induced by seeing that a business, which had previously been carried on by Mr. Clark, was now carried on in the same premises, by what was apparently a partnership firm, under the name of Clark, Maitland & Co. Mathews appears naturally enough to have jumped at the conclusion that Clark was still in the business, and to have told his principals, the plaintiffs, that Clark had taken Maitland into partnership.

In *Martyn v. Gray*, 14 C. B. N. S. 824, at p. 839, Erle, C.J., says: "Formerly it was considered sufficient if the party was held out to the world as a member of the firm or company. Now, however, it is necessary that there should be direct evidence that the holding out should come to the knowledge of the plaintiff: he need not hear or see the defendant's conduct; it is enough if the fact has come to his know-

ledge." So here the plaintiffs and their agent became aware of the use of his name which the defendant had authorized, and drew from it the inference which he intended and expected would be drawn ; and he is responsible, although they did not know as a fact that he had given authority.

Judgment.
MAOLENNAN,
J.A.

In the same case Williams, J., says at p. 841 : " I am of opinion, that if the defendant informs A. B. that he is a partner in a commercial establishment, and A. B. informs the plaintiff, and the plaintiff, believing the defendant to be a member of the firm, supplies goods to them, the defendant is liable for the price." By trading with the plaintiffs in the name of Clark, Maitland & Co., Maitland represented to them that Clark was a partner, and in doing so he was acting with the express authority of the appellant. The principle is estoppel, and I find it stated with reference to a case like this by Brett, J., in *Carr v. London and North Western R. W. Co.*, L. R. 10 C. P. 307, at p. 316, as follows : " If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist." In *Dickinson v. Valpy*, 10 B. & C. 128, at p. 141, Parke, B., states the principle thus : " The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement."

I think there is evidence of all these elements here with reference to the goods sold before July, 1888.

The case is different with regard to the goods sold after that date. One cannot help thinking that the plaintiffs used very little business caution in trusting to the mere firm name for their belief that Clark was a partner, when they might have asked him the question, and have received a decisive answer. But in July the belief they had came to an end.

Judgment.

MACLENNAN,
J.A. Mr. Stewart in his evidence says, when asked about his belief, that he believed Mr. Clark to be a partner up to July, 1888.

About the 1st July, he heard of the chattel mortgage which Clark had taken from Maitland, and he then made inquiries and wrote the letter of 14th July to Mathews. He says the report he received from Mathews, set his mind at rest. Both his letter and Mr. Mathews' report are produced. It is impossible to read these letters and to suppose that after that he had any belief that Clark was a partner. In the letter of the 14th, he says, besides other things, that McKay Brothers had told him that they were always under the impression that he (that is Clark) was a partner, and are surprised that he did not notify them; the evident meaning being, "did not notify them" that he was not a partner. They had all along believed he was, but they have now learned that he is not, and are surprised he did not notify them. Now this letter does not ask Mr. Mathews to make further enquiry about his being a partner, but on the contrary, asks him to have a talk with Clark, and says that if there is any likelihood of his taking over the business, they would certainly like to continue the account. Then comes the report dated 16th July. There is not a word in it about Clark being a partner, but the writer says he has had a talk with Clark, and gives a correct statement of the sale which he had made and the security he had taken and the terms of payment, etc.; and there is clearly nothing in the letter to lead any reasonable man to infer that he was a partner with the persons to whom he had sold the business. I think no person of any sense could draw such a conclusion from the letter.

I think, therefore, the evidence not only fails to shew that the plaintiffs after July believed that the appellant was a partner, but shews conclusively that they did not. See also Lindley on Partnership, 5th ed., pp. 42, 43; Smith's Mercantile Law, 10th ed., pp. 16, 17; Pollock's Law of Partnership, 4th ed., pp. 26, 27.

I am, therefore, of opinion that the appeal fails as to Judgment, goods supplied before July, 1888, but must succeed as to MACLENNAN, goods supplied afterwards. J.A.

HAGARTY, C. J. O. :—

I agree.

Appeal allowed in part without costs.

OELRICHS V. TRENT VALLEY WOOLLEN MANUFACTURING COMPANY.

Sale of Goods—Sample—Inspection.

In a sale by sample of goods to be “laid down” at a certain place, inspection if desired must be made there, and if a proper opportunity of making inspection be afforded and the buyer refuse to inspect and demand that the goods be shipped to another place for inspection the seller is justified in treating this as a breach of contract.
Judgment of FALCONBRIDGE, J., reversed.

THIS was an appeal by the plaintiffs from the judgment Statement of FALCONBRIDGE, J.

The plaintiffs, who were importers of wool, carrying on business in the city of New York, brought the action against the defendants, an incorporated company carrying on a manufacturing business at Campbellford, Ontario, to recover damages for an alleged breach of contract to purchase wool.

On the 26th of March, 1890, Cass & Mote, a firm of wool brokers in New York, who had had previous transactions with the defendants, wrote to them as follows :

“Gentlemen,—We send you by mail to-day samples of some B. A. (Buenos Ayres) wools as per memo. below, and await your report on same.”

The memo. set out the numbers of the different parcels with the weight and price.

Statement.

The defendants telegraphed as follows on the 31st of March, 1890, to Cass & Mote :

"If you will give us six months flat, will take lots No. 127, 128, 129, 130, 131 and 132. Answer quick."

On the same day they sent to Cass & Mote the following confirmatory letter, signed by C. L. Owen, their manager :

"We now confirm our telegram to you this morning Give us six months flat and we will take Nos. 127, 128, 129, 130, 131, 132. Answer quick."

These lots, as you are aware, represent about 50,000 lbs. B. A. wool."

Cass & Mote on the same day telegraphed :

"Wool on other side, forgot to mention in our letter. Will cable your offer to-night."

The defendants then telegraphed on the same day :

"Our offer is for wool laid down New York."

On the same day Cass & Mote wrote to the defendants as follows :

"Gentlemen,—Your telegraph to hand offering on the following lots, 127, 128, 129, 130, 131 and 132, six months. We now confirm our telegram to you of this day. Forgot to mention in letter wool was in Europe. Will cable your offer to-night. The samples were sent to Messrs. Oelrichs & Co., and they will sell you the wool at your offer, or at six months' time if they can do so. We will know to-morrow. Thanking you for the order."

On the 1st of April, Cass & Mote wrote to the defendants as follows :

"Gentlemen,—Your telegram to hand. We so understand your offer, but we thought you may think the wool was here, and we did not want you to have a wrong impression."

On the 3rd of April, 1890, Cass & Mote telegraphed to the defendants as follows :

"Can get 125, 130 and 131. Four months privilege. Six months adding sixty days interest. Shall we take them. Cannot get other three lots. Answer."

On the same day the defendants' manager telegraphed Cass & Mote as follows :

"If you cannot get six months to date from arrival of ^{Statement.} wool in New York we withdraw our offer."

Cass & Mote replied on the same day :

"Telegram received. Have bought the three lots B. A. pulled on six months."

On the same day Cass & Mote, as brokers, signed and forwarded to the plaintiffs and defendants bought and sold notes of the wool.

On the 28th of May, 1890, the plaintiffs telegraphed to the defendants as follows :

"Pulled wool arrived. Please send and approve wool Saturday."

The defendants telegraphed on the same day to the plaintiffs :

"If wool is equal to samples in our possession representing the lots, send it on ; if not, do not want it."

And the plaintiffs on the same day replied by telegram :

"You must inspect the wool here before we ship it."

Further correspondence, which it is unnecessary to set out, took place, the contention of the defendants being that they were not obliged to inspect the wool in New York, but were entitled to have it forwarded to Campbellford for inspection there. The plaintiffs stored the wool, and notified the defendants that they intended to sell it at their risk. They did sell, and then brought this action to recover \$2,717.12 as the loss on the resale. The defendants, among other defences, contended that no contract sufficient to satisfy the Statute of Frauds had been made out, and that the wool should have been forwarded to Campbellford for inspection.

The action was tried before FALCONBRIDGE, J., at the Toronto Winter Assizes of 1892. It was shewn that in several previous transactions between the plaintiffs and the defendants inspection had been made at Campbellford, and that it would be a matter of difficulty to inspect the wool in the bonded warehouses in New York. It was also shewn that the commission of Cass & Mote had been paid

Statement. by the plaintiffs. FALCONBRIDGE, J., held that a contract was made out under the Statute of Frauds, but that the defendants were entitled to inspect at Campbellford and that therefore there had been no breach.

The plaintiffs appealed, and the appeal was argued before HAGARTY, C.J.O., BOYD, C., and OSLER, and MACLENNAN, J.J.A., on the 20th of September, 1893.

Osler, Q. C., for the appellants. The learned Judge has found in favour of the plaintiffs on the question of the sufficiency of the contract, but he has found against them on the question of breach. But in this we submit he has come to a wrong conclusion. The general rule is that the place where delivery is to be made is the place where inspection is to take place: *Towers v. Dominion Iron and Metal Co.*, 11 A. R. 315; *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Perkins v. Bell*, [1893] 1 Q. B. 193; *Dymont v. Thompson*, 12 A. R. 659; 13 S. C. R. 304. The respondents having refused to inspect the wool in New York and having refused to accept it have clearly broken the contract and are responsible in damages. It is true that in a number of other transactions between the plaintiffs and defendants inspection has been allowed at Campbellford, but the purchases in these cases were purchases of different kinds of wool and on altogether a different basis. The mere fact that inspection at Campbellford has been permitted in other cases is by no means sufficient to establish a contract to permit inspection at that place in all cases, and the present transaction must be decided under the terms of the contract set out in the present correspondence.

Clute, Q. C., and *Aylesworth, Q. C.*, for the respondents. There is no contract to satisfy the requirements of the Statute of Frauds. Taking the correspondence by itself this is perfectly clear, and the appellants must rely upon the bought and sold notes. But Cass & Mote, who assumed to act as brokers here, were not really in any sense acting on behalf of the defendants, but were acting for and were

paid by the vendors, so that the bought and sold notes cannot be appealed to to eke out the contract. Even if a contract has been proved, however, there has been no breach for there has been no inspection or opportunity of inspection, and no tender and no refusal. There could be no proper inspection at New York, and the previous course of dealing between the parties shews that inspection should have been allowed at Campbellford. New York was not the place for delivery but was merely an arbitrary point for the adjustment of freight rates and Campbellford was in truth the place for delivery.

Osler, Q. C., in reply.

November 14th, 1893. HAGARTY, C. J. O. :—

I think the learned trial Judge rightly held the evidence of the contract sufficient. Cass & Mote were only wool brokers, not dealing as principals in buying or selling wool, and of this I think defendants were fully aware. As brokers they signed the bought and sold notes which were respectively received without objection and acted upon, and the defendants' manager in his evidence fully recognized the existence of the contract in the notes. Their authority to act for defendants in the matter appears very clearly from the letters and telegrams, etc., outside the evidence furnished by the bought and sold notes.

This being then a valid contract what was its effect? The notes do not specify any place of delivery, but defendants admit in writing that their offer was "for wool laid down in New York." They say they expected it to be in bond in New York, and that it was sold to them to arrive in New York in bond, and they say that their sole position is that they had the right to inspect and reject it when it reached Campbellford in Canada, and that they would have to pay freight from New York. They also admit that payment was to be by note at six months to be dated from arrival of wool in New York, and this was to be "flat," that is, without interest.

Judgment.HAGARTY,
C.J.O.

When the wool reached New York and the defendants were notified thereof, they at once took the position that the plaintiffs might send it on to them if the wool was equal to samples left in their possession "representing the lots," if not they would not want it. The plaintiffs replied that defendants must accept the wool in New York before they shipped it.

I suppose the controversy may be thus stated: The plaintiffs say before we ship goods to you in Canada the matter must be completed here in New York; you will see it and inspect it as you please here and give your note or acceptance as agreed, and the matter is closed.

The defendants say no, we reserve our right to accept if according to sample or to reject if on arriving at Campbellford we find it does not so answer.

In the bought and sold notes there is no reference to samples, but the broker had given samples before the bargain was closed.

The plaintiffs' contention is that they had the wool "laid down in New York" ready for the defendants who could accept or not, at their peril, having opportunity to see and examine it there; and that their cause of action for damages for not accepting was complete in New York on defendants refusing to accept, except on approval in Canada.

We must consider this case on the general law. No evidence was adduced of any binding custom, nor can any practice shewn to have prevailed in previous dealings between the parties govern their respective rights now under discussion. We can find nothing in the evidence to base any sound argument that the parties were contracting on any other principle than that which must govern the ordinary dealings of vendor and purchaser.

I am of opinion that when the goods were, in the defendants' language, "laid down in New York," and when they were notified of their arrival, and were required to complete the dealing, that they were bound—against anything they have shewn to the contrary—to inspect there, if they desired inspection prior to actual acceptance.

If they decided to reject after or before inspection it should have been done in New York at the agreed port of import.

Judgment.
HAGARTY,
C.J.O.

Their refusal was, in effect, to do anything towards accepting or rejecting until the goods were sent some hundreds of miles from New York to the defendants' Canadian mills.

I think the defendants' refusal to do anything until the plaintiffs sent them the wool on the chance of its being approved of in Canada, warranted plaintiffs in treating this as a valid ground of action, a repudiation of the contract on the vendees' part.

Whatever damage is shewn to have resulted to the plaintiffs from this wrongful act they have the right to recover.

The defendants in their defence state that the wool in New York did not answer the sample furnished to them and was moth-eaten and otherwise injured. This objection was hardly seriously relied on, and there is no evidence to prove the allegation.

The case seems to turn, as placed by the defendants, on their alleged right to have the wool forwarded to Campbellford before they could be bound to accept or reject.

On the evidence before us, it seems to me their contention cannot be supported—that the plaintiffs performed their part of the contract, and that the defendants wrongfully refused performance on their part.

Conceding for the argument then, that the defendants had full right to see that the goods laid down in New York were the goods or class of goods ordered by them, and to reject them after such inspection, they still had no right to insist on such inspection elsewhere. And assuming that if the plaintiffs had refused to allow inspection in New York the defendants might on such refusal have refused acceptance, they still appear to me to be in the wrong. They would not be without remedy if the goods were afterwards found to be unmerchantable, or not as represented by the vendors, as, of course, there may be an acceptance not necessarily a waiver of all objections as to quality, etc.

A very large number of cases bearing more or less on

Judgment.

HAGARTY,
C.J.O.

the question here in dispute are to be found summarized in Campbell's Sale of Goods, part 5, sec. 3 (p. 274.)

In Benjamin on Sales, 4th ed., there is a large review of cases. Attention may be called to the discussion beginning at p. 633, on the leading case of *Bloxam v. Sanders*, 4 B. & C. 941. One of the comments on that case is: "In the absence of a contrary agreement the vendor is not bound to send or carry the goods to the vendee. He does all that he is bound to do by leaving or placing the goods at the buyer's disposal, so that the latter may remove them without lawful obstruction."

The latest case cited by Mr. Osler is *Perkins v. Bell*, [1893] 1 Q. B. 193, in the Court of Appeal. The general law is reviewed, and, as I think, it fully establishes that in the absence of agreement to the contrary, the place of delivery is the place of inspection. Smith, L. J., delivering the judgment of the Court, says as to the argument of counsel that the place for inspection need not necessarily be the place at which delivery is to be made: "In this we agree. The question, however, is if there can be read into this contract an implied term that the inspection was to be had at any place fixed by the vendee without the knowledge of the vendor. * * This is a case in which at the time of sale the only known destination was Theddingworth Station, at which the vendor undertook to deliver the barley at his own risk and expense. * * We find no evidence to dislodge the presumption which *prima facie* arises, that the place of delivery is the place for inspection. To hold otherwise would be to expose the vendor to unknown risks, impossible of calculation when the contract was entered into."

The alleged inconvenience of Theddingworth Station as a place for inspection was considered, but not held important in altering the legal result.

To apply this view of the law to our case:—We find the New York importers agreeing at their risk and expense to have the wool "laid down in New York," as the defendants required, at a fixed price and credit.

I think in the absence of agreement to the contrary, that New York was the place for delivery, and for the defendants to accept or shew a valid excuse for nonacceptance.

Judgment.

HAGARTY,
C.J.O.

When the wool arrived there the defendants were notified and asked "to send and approve." The defendants at once reply to send it on to Canada if equal to sample, if not they would not take it.

I consider that the defendants had no right to impose such a duty on the plaintiffs and are liable for refusal to accept. All the defences set up seem to me to have failed, and the appeal should be allowed.

BOYD, C. :—

I agree with the primary Judge that a sufficient contract is proved within the Statute of Frauds by the bought and sold notes, coupled with the conduct of the defendants, which was a ratification of the dealings on their behalf by the brokers—if without that the common agency of these brokers were in doubt.

Assuming, as was argued, the right to inspect the goods, I am compelled to differ from the result of the judgment under appeal. The right of the seller was to get paid on delivery at New York—paid, that is, by note at six months from the date of the arrival of the wool at New York. That, however, imports the prior inspection by the purchaser. The only destination pointed at by the terms of the contract and the prior correspondence is New York, and that is, therefore, presumably the place of delivery, and therefore of inspection for the purpose of completing the contract.

The trial Judge was led to a different conclusion here, not so much by any custom of merchants as by an alleged private usage between the parties. But to my mind the evidence falls far short of manifesting any course of dealing which is to be set up against the plain implication of the writings. Evidence of usage as distinguished from general custom, may avail to turn the scale where the contract

Judgment. is ambiguous, but it ought not to weigh in the present case to change the expressed place of destination (New York) to one in Canada not named by the parties.
BOYD, C.

I do not think it is proved that there is an absence of proper facilities for inspection in the port of New York—if that would make a difference; but the evidence fairly read shews place and opportunity there for sufficient investigation of the condition and quality of the wool.

The appeal should, in my opinion be allowed, and damages awarded to the plaintiffs, as to the amount of which the parties may apply to the trial Judge, or to a Judge of this Court, if they cannot agree.

OSLER, and MACLENNAN, JJ. A., concurred.

Appeal allowed with costs.

MASON V. TOWN OF PETERBOROUGH.

Revivor—Actio personalis, etc.—Damages—Negligence—Executors—
R. S. O. ch. 110, sec. 9.

An action for injury to the person now survives to the executor of the plaintiff, who can, in case of his death *pendente lite*, on entering a suggestion of the death and obtaining an order of revivor, continue the action.

Judgment of the Common Pleas Division affirmed.

THIS was an appeal by the defendants from the judgment Statement.
of the Common Pleas Division.

The plaintiff, a resident of Peterborough, slipped on a sidewalk in that town in February, 1892, sustaining serious injuries, and brought this action against the defendants to recover damages, alleging that the sidewalk had been negligently left by the defendants in a dangerous condition.

The action was tried at Peterborough at the Fall Assizes of 1892, before FALCONBRIDGE, J., and a jury, and the jury disagreed. The defendants then moved before the Common Pleas Division for judgment of nonsuit, and on the 20th of November, 1892, this motion was dismissed with costs. The defendants then appealed, and pending this appeal, on the 6th of March, 1893, the plaintiff died, and by order of revivor dated the 4th of April, 1893, the action was revived in the name of the executors of his will as plaintiffs against the defendants.

The appeal came on for hearing before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ.A., and MEREDITH, J., on the 27th of September, 1893.

The preliminary objection was taken that the right of action had not survived, and the Court directed the argument to proceed on this question, and on the merits also.

Moss, Q. C., and E. B. Edwards, for the appellants. It is quite clear that apart from the provisions of R. S. O. ch. 110, sec. 9, this action came to an end upon the plain-

Argument. tiff's death, and that no new action could, apart from that Act, be commenced by his executors. The effect of the new Act would seem to be, however, that the old law as to the utter extinguishment of a right of action of this kind has been modified, and that the executors of the deceased plaintiff may commence a new action for the same relief. It seems clear, however, even under the amendment of the law that the plaintiff's own action comes to an end upon his death, and therefore the order of revivor was improperly issued in the present case: See *Pulling v. Great Eastern R. W. Co.*, 9 Q. B. D. 110; *White v. Parker*, 16 S. C. R. 699; *Udy v. Stewart*, 10 O. R. 591. [They then proceeded to argue the merits of the appeal, contending that no negligence had been shewn, and that notwithstanding the disagreement of the jury judgment of nonsuit should be entered.]

D. W. Dumble, for the respondents. The new statute does away with the old distinction between actions arising out of tort and those arising out of contract, and even as to actions arising out of tort the maxim *actio personalis moritur cum persona* no longer applies. With the express exception of actions of libel and slander all actions for damages survive, and therefore under Consolidated Rules 620 *et seq.*, an order of revivor may properly be obtained. [He then proceeded to argue the case on the merits.]

Moss, Q. C., in reply.

November 14th, 1893. HAGARTY, C. J. O. :—

By C. S. U. C. ch. 78, sec. 1, in case of injury to real estate, within six months prior to the owner's decease, the executors, etc., could maintain an action if brought within one year of decease. By section 2, if a wrong were committed by a man within six months of his death, in respect of real or personal property, the person wronged could maintain an action against his executors, etc., within six months after such executors had taken on themselves administration of the estate.

These sections appear in R. S. O. (1877) ch. 107, as sections 8 and 9. Then the amending Act, 49 Vic. ch. 16, sec. 23, substitutes for these two sections the sections 9 and 10, which now appear in R. S. O. (1887) ch. 110.

The clause bearing on this case (section 9) allows executors to maintain an action for all torts or injuries to the person or to the real or personal estate of the deceased, except in cases of libel or slander.

This extends the remedy for wrongs to person or personal estate.

It seems, therefore, that the case comes within the class of cases in which executors may enter a suggestion of the death and obtain the order for revivor.

Our Rules 620, 621, 622, will therefore govern.

The remaining question is, whether there was evidence on which the case could be properly left to the jury.

I purposely abstain from remarking on the merits or demerits of the case, as I might thereby possibly prejudice one party or the other in the event of another trial.

A full examination of the evidence leads me to the conclusion that the case there made out, had to be submitted to the jury and not taken into the hands of the Court to be dealt with as presenting no question of fact to be determined.

The defendants now ask us to hold as a matter of law that the case fails. We have no finding of fact to guide us in arriving at any such conclusion, and we cannot, in my judgment, stop the case as failing in law.

I, therefore, think the appeal must be dismissed.

OSLER, J. A.:—

The recent Act, 49 Vic. ch. 16, sec. 23, R. S. O. ch. 110, secs. 9, 10 and 11, would seem, subject to the express exceptions and limitations contained therein, to have practically abolished the ancient common law rule as to torts expressed by the maxim *actio personalis moritur cum persona*, for, as to actions by executors, etc., it is enacted

Judgment.

HAGARTY,
C.J.O.

Judgment.

OSLER,
J.A.

by section 9 that the executors or administrators of any deceased person may maintain an action for all torts or injuries to the person or to the real or personal estate of the deceased, except in cases of libel and slander, in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do; and the damages when recovered, shall form part of his personal estate, *but such action shall be brought within one year after his decease.* This enactment embraces all former statutory changes made in the ancient rule, the principal alteration actually introduced by it being that causes of actions for torts where the injury done is of a personal nature, now survive to the executors, as well as those for injuries to testator's real and personal estate: R. S. O. (1877) ch. 107, secs. 8 and 9.

The injury, which is the subject of this action, is therefore one for which the representatives of the deceased might sue; in other words, the cause of action is one which by virtue of the new Act, survives to them; and the only question is, whether they can take up the testator's action and continue it by having themselves made parties plaintiff instead of him. The defendants point to the language of the section, "that the executors may maintain an action, and with the same rights and remedies as the deceased would, if living, have been entitled to do; but such action shall be brought within a year from the decease," as requiring a new action to be brought, and as opposed to the right to revive or continue the old. But this language is substantially similar, except as to the limitation clause, to that of the statute 4 Ed. III. ch. 7, which made the first breach in the common law maxim referred to, and which provided that executors should (in the cases to which it was construed to extend), "have an action and recover their damages in like manner as they whose executors they be should have had if they were living." Such causes of action were familiarly said to survive to the executors, and their class is merely enlarged by the recent legislation. But though they did thus sur-

vive to the executors, an action brought by the person injured would have abated by his death under circumstances similar to these in the present case, *i. e.*, death before verdict or judgment by default, and could not be revived; and the executors were put to their new action, until by the C. L. P. Act, 1856, sec. 210, the right was given to the personal representative of a deceased sole plaintiff to enter a suggestion of the death, and to continue the action in those cases where the cause of action, before that Act, would have survived, and he would have commenced an action upon it in his representative character: *Flinn v. Perkins*, 32 L. J. Q. B. 10. That section then provided a means for continuing the old proceedings by the representative where the case was such that he could himself have brought an action. The Consolidated Rules 620, 622, of the Judicature Act, now embrace the extended class, providing that an action shall not abate by reason of the death of any of the parties, if the cause of action survives or continues, and that an order may be obtained to carry it on in the names of the new and continuing parties.

These rules are intended to be acted on and applied in the altered state of the law in the same manner as was section 210 of the Common Law Procedure Act, 1856, and therefore as the cause of action in this case is one which survives, the plaintiff's representatives are not put to a new action but may revive and continue that which was brought by the deceased. There can be no difficulty in applying in a proper case to proceedings taken for such a purpose the limitation clause in section 23 of the new Act. *Twycross v. Grant*, 4 C. P. D. 40; *Kirk v. Todd*, 21 Ch. D. 484; *Udy v. Stewart*, 10 O. R. 591; *Hamilton Provident and Loan Society v. Cornell*, 4 O. R. 623, and 1 Williams on Executors, 6th ed., pp. 743, 744, may be referred to as shewing the former state of the law.

The action being then properly constituted and continued, the next question is whether it should be dismissed on the ground that there was no evidence to go to the jury

Judgment.

Oslan,
J.A.

Judgment.

OSLER,
J.A.

at the trial on which they disagreed. Upon this, after a careful perusal of the evidence, I feel obliged to say that in my opinion the learned Judge could not properly have withdrawn the case from the jury and taken it into his own hands and dismissed it. There was some evidence, weak, I admit it was, of the sidewalk being out of repair generally and at the particular spot where the plaintiff met with his accident, but it was for the jury to deal with it, and therefore I think we ought not to interfere with the judgment of the Common Pleas Division dismissing the motion to enter judgment for the defendants.

MEREDITH, J. :—

I agree.

MACLENNAN, J.A. :—

I agree with the other members of the Court that the action survives by virtue of the express provisions of the statute, but I have the misfortune to differ on the question of evidence.

I am unable, with great deference, to hold that there is in this case any evidence of disrepair which ought to be submitted to a jury. The plaintiff slipped upon a plank in the sidewalk which was firm and solid, but one side of which was depressed one and a-half inches lower than the other side. That is his own account of it. I think the condition of other parts of the same sidewalk is immaterial, as it is not pretended it had anything to do with the accident.

I think the appeal should be allowed.

Appeal dismissed with costs,
MACLENNAN, J. A., *dissenting.*

BREITHAUPT V. MARR.

Creditors' Relief Act—Assignment for the Benefit of Creditors—Executions
—R. S. O. ch. 65.

Creditors whose executions or certificates under the Creditors' Relief Act are placed in the sheriff's hands after the execution debtor has made a general assignment for the benefit of his creditors are not entitled to share, under that Act, in the proceeds of goods seized by the sheriff under prior executions before the assignment was made, the proceeds being insufficient to pay these prior executions.

Roach v. McLachlan, 19 A. R. 496, applied.

Judgment of the County Court of Simcoe reversed.

THIS was an appeal from the judgment of the County Court of Simcoe.

The Breithaupt Leather Company obtained judgment Statement. against one Frederick Marr on the 18th of July, 1893, and on that day placed a writ of execution against his goods in the hands of the sheriff of Simcoe, who under it on the same day seized his stock-in-trade in the town of Barrie. On the 20th of July, Beardmore & Co. and Park & Co. also obtained judgments against Marr and placed writs of execution in the hands of the sheriff of Simcoe on that day. The total amount of the three judgments was over \$2,000. On the 26th of July, Marr made a general assignment for the benefit of his creditors, and on the 27th of July, notice of this assignment was given to the sheriff. After this assignment had been made, between the 8th of August and the 5th of September, several other creditors obtained judgments against Marr and placed their executions in the sheriff's hands, and in August the sheriff sold the goods, realizing about \$600. He then prepared his scheme of distribution under the Creditors' Relief Act, placing all the execution creditors on the dividend sheet. The creditors who had placed their writs in his hands before the assignment was made appealed to Boys, Junior Judge of Simcoe, contending that the creditors who had obtained judgment and placed their writs in the sheriff's

Statement hands after the assignment was made were not entitled to share, and on the 14th of October, 1893, this appeal was dismissed.

These creditors then appealed to this Court and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ.A., on the 16th and 17th of November, 1893.

Moss, Q. C., and Pepler, Q. C., for the applicants. The learned Judge has attempted to distinguish between the case of transfer of the seized property to a *bond fide* purchaser or mortgagee, and its transfer to a mere voluntary assignee, and he thinks that to allow the execution creditors who came in before the assignment to receive all the proceeds would be an injustice. But the case cannot be decided on any consideration of this kind. It must be borne in mind that the Creditors' Relief Act is an attempt to curtail the common law rights of creditors and that Act must be strictly construed. After the assignment has been made the property is no longer the property of the debtor and executions against him do not bind it, and cannot share. It is not possible to distinguish *Roach v. McLachlan*, 19 A. R. 496. Moreover, the exact point has been discussed in *Turner v. Murray*,* and although in that case

* TURNER V. MURRAY.

THIS was an appeal from the judgment of the County Court of Lincoln, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 30th and 31st of January, 1893.

W. F. Walker, Q. C., for the appellants.

H. S. Osler, for the respondents.

In December, 1887, Turner & Co., obtained a judgment against Murray, and on the 7th of that month placed writs of execution against his lands and goods in the hands of the sheriff of Lincoln. On the 9th of December, 1887, Murray made a general assignment for the benefit of his creditors under R. S. O. ch. 124., to the same sheriff, and Turner & Co. proved their claim under this assignment and attended several meetings of creditors, and took part in the winding-up of the estate.

One Helen J. Holliday made a claim against the estate, and this claim was opposed by Turner & Co., and an action brought by Holliday to

it was not necessary to decide the point the opinions of some of the Judges of this Court are clearly in favour of the view now contended for. Argument.

W. N. Miller, Q. C., for the respondents. It is submitted that the distinction pointed out between this case and *Roach v. McLachlan*, 19 A. R. 496, is well founded. It would be most unreasonable to hold that a man who has purchased or advanced money on the security of property subject to an execution should take nothing because other execution creditors place their writs in the sheriff's hands after the transfer or mortgage to him, but where a mere voluntary assignment is made for the benefit of creditors the assignee has no higher rights than the assignor, and executions coming to the sheriff's hands after the assignment really affect the debtor and his property just

establish the claim was defended by them pursuant to an order obtained by them for that purpose. Ultimately, after an appeal to the Court of Appeal, this claim was established. In the meantime, the sheriff proceeded to wind up the estate under the assignment and disposed of the personal property and of some real estate with the assent of both Turner & Co., and Holliday. After the decision of the case of *Union Bank v. Neville*, 21 O. R. 152, Turner & Co. notified the sheriff that they claimed priority by virtue of their writs, and directed him to sell the undisposed of lands. A sale was effected on the 10th of October, 1891, and at the instance of the purchaser's solicitor, the conveyance of the property was made by the sheriff both as sheriff and as assignee. Owing to certain difficulties in connection with the carrying out of the sale, the purchase money was not paid to the sheriff until the 16th of December, 1891, on which day notice of the receipt of the money was duly entered by him. On the 15th of January, 1892, Holliday placed in the sheriff's hands a writ of execution. The sheriff then prepared a scheme of distribution, giving to Turner & Co. priority for their costs, and subject to this providing for a ratable distribution of the money between Turner & Co. and Holliday; this scheme of distribution being based on the assumption that the 9th section of the Assignments Act was invalid, and that the execution of Turner & Co. took priority over the assignment. Turner & Co. contended that Holliday was not entitled to share, on the ground that the assignment having intervened between the time when the writ of execution of Turner and & Co. was delivered to the sheriff and the time when the writ of execution of Holliday was delivered to him there was no interest upon which the latter writ of execution could attach or operate; and also on the ground that the sheriff's entry should have been made on the day of the sale.

Argument. as much as those coming in before the assignment, and all should be allowed to share ratably. The fund realized by the sheriff becomes a fund for distribution under the provisions of the Act, and all that the sheriff has to see to is that the writs come in within the time limited. The lodging of the writs in the sheriff's hands is required merely for the purpose of enabling him to ascertain the amount of the debts so that he may make distribution among all the creditors of the debtor. Under the Amending Act, 51 Vic. ch. 11 (O.), writs of execution against goods share in moneys realized under writs against lands, and *vice versa*, shewing clearly that it is only for the purpose of ascertaining the debt that the writ is looked at.

No reply was called for.

March 7th, 1893. The Court, OSLER, J.A., dissenting, held that the money was distributable under the assignment, and that the case did not come within the Creditors' Relief Act.

HAGARTY, C. J. O., after stating the facts, said :—

I am unable to understand how after the full election to adopt the statutory assignment as a lawful disposition of the insolvent's estate, Turner & Co. can now be heard arguing that the whole proceedings were null and void, and that their execution should prevail. I think that the scheme of distribution cannot be supported, and that the moneys must be ratably distributed under the deed of assignment.

BURTON, J.A., took the same view, holding that Turner & Co.'s writ of execution was clearly abandoned, and that the sale must be held to be one under the assignment, and that the whole assets must be distributed under the assignment. He then added :—

It is unnecessary to pronounce any opinion as to what Holliday's right might have been if the sale under the execution had been valid, but I think if there had been any surplus after paying the plaintiffs' claim it would have gone to the assignee and have been distributed under the assignment among all the creditors equally and I think she would have been estopped by coming in under the assignment from claiming adversely to that body.

OSLER, J. A., after setting out the facts said :—

I entirely agree with the learned Judge of the County Court, that the entry of the notice in the sheriff's books of the receipt of the money is the time from which the month is to run within which other exe-

HAGARTY, C. J. O. :—

Judgment.

HAGARTY,
C.J.O.

I am unable to see any distinction between this case and that of *Roach v. McLachlan*, 19 A. R. 496. Whether the transfer is made by sale, mortgage or voluntary assignment the debtor's title is gone, and executions subsequently coming in against him do not affect the property that has been previously sold, mortgaged or assigned, and cannot therefore, in my opinion, share in the proceeds of sales made under prior executions.

OSLER, J. A. :—

It is impossible, I think, to escape from the logical effect of *Roach v. McLachlan*, 19 A. R. 496. It is true that the assignee takes the property subject to the executions, but the legal title passes to him, and it is the assignee's property and not the debtor's that the sheriff sells.

utions must be delivered in order to entitle them to share in the distribution; the fourth section plainly says so and there is no room for a different construction. The sheriff may by negligent or unwarranted delay in receiving the money and making the entry leave himself open to an action at the suit of any creditor injured thereby, but the right of the subsequent execution creditor is to be ascertained only by the date of the entry which the statute requires to be made.

The next question is whether the intervention of the assignment between the delivery of the appellants' execution and that of the respondent makes a difference in the latter's right to share in the moneys made on the first writ. The appellants rely on the recent case of *Roach v. McLachlan*, 19 A. R. 496, which had not been decided when the judgment appealed from was given. Upon the fullest consideration I think that case was rightly decided and that this case is not in principle distinguishable from it. Taking the appellants' writ to be prior to the assignment the assignee became the owner of the property subject thereto, for the benefit of the assignor's creditors generally, and it was his property which was sold by the sheriff. Under the prior writ the sheriff never could levy or apply more of the property than would be sufficient to satisfy it, since all beyond that would go to the assignee to be distributed among the other creditors under the assignment.

But if execution creditors coming in after the assignment are entitled to share in the moneys levied under the prior execution, the sheriff must, in order to pay the prior execution which is entitled to be paid in full, so far as the property will extend, continue to apply the proceeds for that

Judgment. MACLENNAN, J. A. :—

MACLENNAN,
J.A.

I also am clearly of the opinion that this case is governed by *Roach v. McLachlan*, 19 A. R. 496. If the money were realized and the entry made in the sheriff's books before the assignment it is possible that the fund might be divisible among all creditors coming in within the limited time. But no question of that kind arises here, for the sale was not made until after the assignment, and at that time the property was the property of the assignee, subject to the executions placed in the sheriff's hands before the assignment was made.

Appeal allowed with costs.

purpose, and everything which he then takes comes out of that portion of it which would otherwise have passed to the assignee to be distributed among creditors generally, with the result that execution creditors who come in after the assignment, would nevertheless be in the same position as the creditor who holds the first execution, and the assignee would take nothing until all were paid in full.

Thus tested the right of the subsequent execution creditor to share in the proceeds of the sale fails, and the fact that the first execution exhausts the whole can make no difference, since the whole so applied was the property not of the judgment creditor but of the assignee.

MACLENNAN, J. A., after setting out the facts and coming to the same conclusion as HAGARTY, C. J. O., and BURTON, J. A., said :—

Holliday's execution was originally issued as a precaution, on *Turner & Co.* contending that the assignment was invalid, or that it was overridden by their execution. But Holliday's execution did not impair her rights under the assignment. Those rights remained and still remain as they were before. The execution issued by her attached upon nothing. It was issued after the assignment was made, and after everything that the debtor had had passed out of him. It could not touch the property in the hands of the assignee. Therefore, Holliday's claim also is under the assignment and under that alone.

ALLISON V. McDONALD.*

Partnership—Debtor and Creditor—Novation—Collateral Security—Release.

A creditor of a partnership held a note of the firm with a mortgage as collateral security, on property of the firm, amply sufficient to secure his claim. Subsequently, with knowledge of the dissolution of the firm, at the request of one partner who had assumed the liabilities, and without the consent of or notice to the other, he discharged the mortgage, without payment of the note, in such a way as to vest the whole interest in the property, freed from the mortgage, in the continuing partner :—

Held, That he could not afterwards sue the retiring partner on the note.

Walker v. Jones, L. R. 1 P. C. 50, applied.

Judgment of Queen's Bench Division, 23 O. R. 288, reversed, MACLENNAN, J.A., dissenting.

THIS was an appeal by the defendant from the judgment Statement. of the Queen's Bench Division, reported 23 O. R. 288, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 1st of June, 1893.

J. A. Robinson, and *W. J. Tremear*, for the appellant.

Aylesworth, Q. C., for the respondent.

The facts and arguments are fully stated in the report of the case in the Court below.

November 14th, 1893. OSLER, J. A. :—

The judgment of the Queen's Bench Division appears to turn upon the question whether by reason of the dealings between the defendant and Adam Allison at the time of the dissolution of their partnership the plaintiff was bound to treat the former as having become a surety for the latter in respect of the note, although at the commencement of the transaction they were, as regards him, though not as between themselves, both principal debtors. If the case can be treated simply as one of principal and surety, I do not think the decision of the Court *a quo* can be quarrelled with. The learned Chancellor, however, did not dispose of it at the trial strictly upon that ground, as I understand

* See *In re Head*, *Head v. Head*, [1893] 3 Ch. 426 ; *Rouse v. Bradford Banking Company*, [1893] W. N. 194.—*REP.*

Judgment.

OSLER,
J.A.

his judgment. It may be that the plaintiff did not know that the defendant made the note as surety for Adam Allison, or that he had become such at the time of the dissolution of their partnership by reason of the latter's agreement to indemnify him against the debt, and if that were so he might still have treated both as principal debtors and have given time to Adam Allison, or released or given up any security given by Adam Allison for the debt, without affecting his right to call upon the defendant, as the other principal debtor, for payment. Here, however, he had taken as collateral security for the debt a mortgage upon something which was then the property of both of his debtors. And I think the evidence leads irresistibly to the conclusion that he knew not only of the dissolution of their partnership but also that as consequent upon the dissolution this mortgaged property had become the sole property of one of the debtors, viz., of Adam Allison, subject to the mortgage. The correspondence between the brothers on the subject of the discharge and the plaintiff's evidence as to their dealings in respect of it and in relation to the debt, support the findings of the learned Chancellor on this point, and if they do not go so far as to prove that the plaintiff knew that Adam Allison had assumed payment of the debt, and had accepted him as his sole debtor, do at all events shew that the plaintiff knew that the defendant had not, as between Adam Allison and himself, assumed the liability for it, and was therefore still interested in the mortgaged property as being a security for the debt, though Adam Allison had become the sole owner of the equity of redemption, a position which carried with it a *prima facie* liability on his part to pay off the mortgage or the debt secured by it. Instead of reconveying the property to the two mortgagors, or communicating with the defendant on the subject, the plaintiff executed an absolute discharge of it to his brother, thereby vesting in him the whole interest in the property freed from the mortgage, and by delivering to him the mortgage and discharge put it in his power to do what he at once proceeded to do, viz., to dispose of it so as to

prevent the defendant from having any recourse against it, and, what is more to the purpose, put it out of his own power to assign or convey the property to the defendant in case he called upon him to pay the note as he is now doing. The plaintiff by his own act has lost the security in which the defendant was interested as a means of paying this note, and can no longer comply with the duty incumbent on every mortgagee of making a reconveyance of the mortgaged property upon payment of the debt. The debt was the principal, and the mortgage the accessory, and the plaintiff in the absence of agreement had no right to separate them. The case appears to fall completely within the principle of *Walker v. Jones*, L. R. 1 P. C. 50. See also *Central Bank of Canada v. Garland*, 20 O. R. 142, affirmed 18 A. R. 438. I am, therefore, of opinion that the judgment of the Queen's Bench Division should be reversed, and that of the Chancellor restored.

Judgment.

OSLER,
J.A.

HAGARTY, C. J. O.:—

I agree in the judgment just delivered. The plaintiff knew of the dissolution, although there is no proof that he knew the terms thereof. But he knew that his brother carried on the banking and other business in his sole name, and apparently had the amount of this note placed to his credit in the bank.

He learns from the correspondence with his brother that the latter was proposing to deal with the property, which the firm had mortgaged to him, apparently as the owner exchanging it for other property. I think all this put him upon enquiry, and that he could not release the mortgage without ascertaining how matters stood. His abstaining to do so worked a serious injury to the present defendant, if the plaintiff can hold him to liability on the note and yet deprive him of recourse to the mortgage security. If it had been assigned to the brother on the dissolution we must assume it would be subject to his taking upon himself the burden of the sum charged upon it as collateral to the note.

Judgment. BURTON, J. A. :—

BURTON,
J.A.

One of the points discussed upon the argument before us was whether the mortgage was to be considered as the principal debt, and the note simply collateral or *vice versa*, but in my opinion no such question arises. It was all one transaction, and the proviso for redemption in the mortgage shews that the payment of the note would have been a discharge of the mortgage entitling the makers to a reconveyance.

No one could safely have taken a transfer of the mortgage without the note, and although a *bond fide* assignment of the note to an innocent purchaser would have entitled him to enforce payment of it, such payment would have discharged the mortgage in whose hands soever the debt might be, a mortgagee not being allowed to alienate the securities away from the debt, and so long as the note remained unpaid the mortgagee would hold the mortgage as security for its payment.

If, therefore, there had been no reference to the note in the mortgage, if the mortgagee had assumed to transfer it retaining the note, he could not, as it seems to me, have been allowed to proceed to enforce its payment.

How then does that principle affect the present case? The defendant was mortgagor and entitled on payment of the debt to a reconveyance of the property. The plaintiff has by his dealing with it placed it out of his power to reconvey it.

As between himself and Adam Allison he might safely discharge the mortgage retaining his right to proceed upon the note, but it seems to me to be contrary to principle and opposed to my sense of justice that he should discharge the security upon which the defendant had a right to rely without his consent.

I agree, therefore, with the Chancellor upon this point, and it does not become necessary for me to express any opinion upon the point on which the Divisional Court has decided this case, but I may say that after referring again

to my judgment in *Birkett v. McGuire*, 7 A. R. 53, I retain the opinion that *Swire v. Redman*, 1 Q. B. D. 536, was a correct exposition of the law.

Judgment.
BURTON,
J.A.

Upon the ground, however, which I have first mentioned, I think the decision of the Chancellor ought not to have been interfered with, and should be restored.

MACLENNAN, J. A. :—

In *Birkett v. McGuire*, 7 A. R. 53, this Court held that *Swire v. Redman*, 1 Q. B. D. 536, was good law, and although the judgment of this Court was reversed in the Supreme Court of Canada: Cassels's Dig. 599; 19 C. L. J. 275, the reversal proceeded on the ground that the debt sued for had been paid in the course of the dealings between the plaintiff and the partners who continued to carry on the business. I therefore agree with the Divisional Court that the defendant cannot succeed on any ground of principal and surety, inasmuch as the debtors did not in the first instance stand in that relation to each other.

I was, however, for some time of opinion that what occurred between the plaintiff and his brother amounted to a payment of the debt, as was held in *Birkett v. McGuire*, in the Supreme Court. There is a good deal of evidence in support of that view, but upon the whole I think it is not sufficient. After the dissolution, which occurred in February, 1889, which the trial Judge, rightly as I think, finds the plaintiff was well aware of, the plaintiff's brother, Adam, continued to carry on the business of a private banker by himself and for his own benefit. The note in question fell due on the 4th March, 1890, and the plaintiff says his brother then asked him to allow his money to remain in the bank, saying he might as well leave it there as put it in another bank, and that he had consented to do so, and left it there as a deposit. He also says he thinks he took from his brother a book with the interest in it; that when the mortgage was

Judgment.
MACLENNAN,
J. A.

discharged he and his brother reckoned up the interest due up to some date in June, 1891, and that the interest was deposited; and he adds, "of course the interest was deposited," and "the interest on the principal was to draw ten per cent. interest until paid." I think this last statement means that such was the agreement after the debt became due as to the interest which should be paid from maturity. Now, if the debt had been an ordinary partnership debt, say for goods sold and delivered, not represented by note or mortgage, I should have thought there was here sufficient evidence of satisfaction and discharge of the partnership debt in consideration of a new contract between the plaintiff and his brother as banker and customer. The contract between a banker and his customer has special features wherein it differs from an ordinary debt, and it would be a perfectly good consideration for the discharge of a past due debt, without the actual passing of any money between the parties, if such was the agreement. In the present case, however, there was a promissory note and a mortgage, and the mortgage was to be void on payment of the note; and the correspondence between the plaintiff and his brother shews that although the plaintiff was content that his money should be regarded as on deposit in his brother's bank at interest, it was no part of the bargain that he should give up his note or his mortgage. The first letter is on the 12th May, 1891, from Adam to the plaintiff asking for a discharge of the mortgage. He is so far from asking for it as a right, or as something agreed upon, that he says he is going to take the mortgage up and pay it off, and that the plaintiff can hold the note until he gets the money. The plaintiff's answer to that is that if he is selling, he wants him to lift the whole thing. Unfortunately for the plaintiff, and also for the defendant, the former signed a discharge of the mortgage on the 19th of May, and delivered it to his brother, who registered it two days afterwards. But it is clear that there was no agreement on the plaintiff's part to give up the note or his right of action thereon for any consideration whatever.

If that is so, I do not see how his discharge of the mortgage has taken away his right of action on the note. While he held both he could have sued either upon the note or upon the mortgage. A creditor's debt is not affected by his giving up to his debtor collateral securities received from him, and that is all the plaintiff did. He discharged a mortgage received from both debtors, without any consideration, but he retained the note by express arrangement. If the title of the mortgaged property had remained as it was when the mortgage was made, that would have worked no harm to any one but the plaintiff himself. But it seems that the defendant had, in 1889, conveyed his interest to his late partner, and so, when the discharge was registered, the title became wholly vested in the latter, and he was enabled to dispose of it for his own benefit and to put it beyond the reach of the defendant, although the note was still unpaid. Strangely enough what Adam Allison did, after obtaining the discharge, was to go to the defendant for assistance in borrowing money on the land; he did assist him, and he says the amount of the loan, \$1,000, passed through his hands. If he had then enquired whether the note had been paid, and, finding that it had not, had refused to part with the \$1,000 until that had been done, he might have protected himself, but he did not enquire, and paid over the money.

There is no evidence of notice to the plaintiff that the defendant had conveyed the land to his late partner except the correspondence, and I think what is there to be found would not necessarily convey to the mind of the plaintiff that there had been any change in the title of the mortgaged property. Unless it would, we cannot hold that there was any duty cast upon the plaintiff to abstain, in the interest of the defendant, from discharging the mortgage at the request of one of the debtors. For anything he knew or had reason to suspect, the request to discharge the mortgage was the request and for the benefit of both partners. He knew the partnership was not wound up, for his own debt was a partnership debt, and the request to

Judgment.
MACLENNAN,
J.A.

Judgment. discharge the mortgage was for the very purpose of
MACLENNAN, J.A. facilitating arrangements to pay it off. I think when a
Court is called upon to deprive a creditor of his debt without actual payment, the evidence on which that is done ought to be full and clear, which I think it is not in this case.

I am, therefore, of opinion that the judgment is right and ought to be affirmed.

Appeal allowed with costs,
MACLENNAN, J. A., *dissenting.*

END OF VOLUME XX.

APPENDIX II.

Cases reported in the Ontario Appeal Reports disposed of by the Judicial Committee of the Privy Council, or by the Supreme Court of Canada, since the publication of Volume 19, up to January 1st, 1894.

Judicial Committee of the Privy Council.

DUGGAN v. LONDON AND CANADIAN LOAN AND AGENCY Co., 18 A. R. 305.—Judgment of the Supreme Court of Canada, 20 S. C. R. 481, reversed, and that of the Court of Appeal for Ontario restored; July 22nd, 1893: [1893] A. C. 506.

IN RE THE CITY OF TORONTO AND THE TORONTO STREET RAILWAY Co., 20 A. R. 125.—Judgment of the Court of Appeal for Ontario affirmed; July 29th, 1893: [1893] A. C. 511.

TENNANT v. UNION BANK, 19 A. R. 1.—Judgment of the Court of Appeal for Ontario affirmed; December 9th, 1893.

Supreme Court of Canada.

ATTORNEY-GENERAL OF CANADA v. CITY OF TORONTO, 18 A. R. 622.—Appeal allowed with costs; February 20th, 1893.

CAMPBELL v. ROCHE, 18 A. R. 646.—Appeal dismissed with costs; February 20th, 1893, *sub. nom. Campbell v. Patterson*, 21 S. C. R. 645.

CONNELL v. TOWN OF PRESCOTT, 20 A. R. 49.—Appeal dismissed with costs; June 24th, 1893.

certain work is or is not extra work and does or does not fall within the plans and specifications. The possible bias of the engineer in favour of the plans and specifications drawn by him is not sufficient to disqualify him. Judgment of ROSE, J., affirmed on other grounds. *Farquhar et al. v. City of Hamilton et al.*, 86.

See MUNICIPAL CORPORATIONS, 3
—RAILWAYS, 2.

ASSESSMENT AND TAXES.

See JURISDICTION — MUNICIPAL CORPORATIONS, 5.

ASSIGNEE.

See ASSIGNMENTS AND PREFERENCES, 1.

ASSIGNMENTS AND PREFERENCES.

1. *Partnership and Separate Estate* — R. S. O. ch. 124, sec. 5. — *Assignee* — *Costs*.] — Where an assignment for the benefit of creditors is made by an assignor carrying on business by himself, creditors having claims against him for goods sold to a firm in which he was formerly a partner are entitled to rank against his estate ratably with creditors having claims for goods sold to the assignor alone.

Section 5 of R. S. O. ch. 124, does not apply to such a case, but only to the case of an assignor who has both separate estate and joint estate.

The assignee for the benefit of creditors, may be ordered to pay the costs of the action personally as any other unsuccessful litigant may be.

Judgment of the Common Pleas Division affirmed. *Macdonald v. Balfour*, 404.

2. *Bankruptcy and Insolvency—Evidence—Presumption—Onus of Proof*—R. S. O. ch. 124, sec. 2, subsecs. 2 (a) and 2 (b)—54 Vic. ch. 20 (O.).]—Held, per HAGARTY, C. J. O. (*hesitante*), and BURTON, J. A.—The presumption spoken of in sub-sections 2 (a) and 2 (b) of section 2 of R. S. O. ch. 124, "An Act respecting Assignments and Preferences by Insolvent Persons," as amended by 54 Vic. ch. 20 (O.), is a rebuttable one, the onus of proof being shifted in cases within the sub-sections.

Per MACLENNAN, J. A.—The presumption is limited to cases of pressure, and as to that is irrebuttable.

Per OSLER, J. A.—The presumption is general and is irrebuttable; but the security in question is supportable under the previous promise.

Cole v. Porteous, 19 A. R. 111, distinguished.

Judgment of the Common Pleas Division, 22 O. R. 474, affirmed. *Lawson v. McGeoch, et al.*, 464.

See CREDITORS' RELIEF ACT, 2.

ATTACHMENT.

Salary not yet Due—Rule 935—Salary of Police Magistrate—Public Policy.]—The salary of a judgment debtor, not actually due or accruing due at the time of service of the attaching order, but which may thereafter become due, cannot be attached to answer the judgment debt; and the enlarged provisions of Rule 935 have made no difference in this respect.

The salary of a police magistrate

appointed by the Crown, but paid by a municipality, cannot, on grounds of public policy, be attached; *HAGARTY, C. J. O.*, expressing no opinion on this point. *Central Bank v. Ellis*, 364.

BANKRUPTCY AND INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES, 2—CONSTITUTIONAL LAW—LIMITATION OF ACTIONS, 2.

BENEVOLENT SOCIETY.

See INSURANCE, 2.

BILLS OF SALE AND CHATTEL MORTGAGES.

See SALE OF GOODS, 1.

BONUS.

See MUNICIPAL CORPORATIONS, 4.

BRIDGE.

See MUNICIPAL CORPORATIONS, 1—NEGLIGENCE, 2.

BY-LAW.

See DRAINAGE—MUNICIPAL CORPORATION, 4, 6, 7.

CASES.

Anderson v. Northern R. W. Co., 25 O. P. 30, distinguished and questioned.]—See NEGLIGENCE, 1.

Arscott v. Lilley, 14 A. R. 283, applied.]—See JURISDICTION.

Boice v. O'Loane, 3 A. R. 167, followed.]—See LIMITATION OF ACTIONS, 3.

Cole v. Porteous, 19 A. R. 111, distinguished.]—See ASSIGNMENTS AND PREFERENCES, 2.

Cornwallis, Municipality of, v. Canadian Pacific R. W. Co., 19 S. O. R. 702, distinguished.]—See MUNICIPAL CORPORATIONS, 5.

Day v. McLea, 22 Q. B. D. 610, applied.]—See LIMITATION OF ACTIONS, 3.

Holmes v. Murray, 13 O. R. 756, distinguished.]—See WILL, 2.

Legacy v. Pitcher, 10 O. R. 620, distinguished.]—See JURISDICTION.

Lockie v. Tennant, 5 O. R. 52, approved.]—See MORTGAGE AND MORTGAGEE.

Manufacturers' Life Insurance Co. v. Gordon, 20 A. R. 309, applied.]—See INSURANCE, 4.

McGeachie v. North American Life Assurance Co., 20 A. R. 187, applied and followed.]—See INSURANCE, 3, 4.

McMichael v. Grand Trunk R. W. Co., 12 O. R. 547, approved.]—See RAILWAYS, 4.

Regina v. Hartley, 20 O. R. 481, approved.]—See JUSTICE OF THE PEACE.

Regina v. Smith, 46 U. O. R. 442, approved.]—See JUSTICE OF THE PEACE.

Scott v. Corporation of Tilsonburg, 13 A. R. 233, applied.]—See MUNICIPAL CORPORATIONS, 4.

Smith v. Methodist Church, 16 O. R. 199, approved.]—*See* WILL, 1.

Tipling v. Cole, In re, 21 O. R. 276, approved.]—*See* PROHIBITION, 3.

Walker v. Jones, L. R. 1 P. O. 50, applied.]—*See* PARTNERSHIP.

Wills v. Carman, 17 O. R. 223, discussed.]—*See* DEFAMATION, 2.

CERTIFICATE OF CLAIM.

See CREDITORS' RELIEF ACT.

CODICIL.

See WILL, 2.

COLLATERAL SECURITY.

See PARTNERSHIP, 2.

COLLISION.

See NEGLIGENCE, 2.

COMPANY.

Winding-up—Power to Carry on Business—R. S. O. ch. 183, sec. 8, sub-sec. 1.]—The paramount object of the Ontario Winding-up Act is the division of the company's assets among its creditors and members with all reasonable speed.

The power to carry on the business after winding-up proceedings have been commenced, and thus to postpone the final winding-up, is one which is not to be exercised unless a strong case of necessity for doing so exists.

That the mortgagees of the company's works, who have foreclosed their mortgage, will be enabled to dispose of the works to greater advantage, and that by affording facilities for procuring repairs to the purchasers of the machinery manufactured by the company the chances of obtaining payment of outstanding purchase notes will be improved, are not sufficient grounds to justify the carrying on of the business.

Judgment of the County Court of Peel reversed. *In re The Haggart Brothers Manufacturing Company (Limited)*, 597.

CONDITION.

See INSURANCE, 3, 4.

CONDITIONAL SALE.

See SALE OF GOODS, 1.

CONDITION PRECEDENT.

See INSURANCE, 2.

CONSIDERATION.

See ILLEGALITY.

CONSTITUTIONAL LAW.

Bankruptcy and Insolvency—Property and Civil Rights—Assignments and Preferences—B. N. A. Act, secs. 91 (21), 92 (13)—R.S.O. ch. 124, sec. 9.]—*Held*, MACLENNAN, J. A., dissenting, and OSLER, J. A., expressing no opinion, that section 9 of R. S. O. ch. 124, "An Act re-

specting Assignments and Preferences by Insolvent Persons," is *ultra vires* the Ontario Legislature. *In re Assignments and Preferences Act*, 489.

CONTEMPT OF COURT.

See *YOUNG v. SAYLOR*, 645.

CONTESTATION.

See CREDITORS' RELIEF ACT.

CONTRACT.

See ARBITRATION AND AWARD—INSURANCE, 5.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

COSTS.

See ASSIGNMENTS AND PREFERENCES, 1—SOLICITOR.

COUNTY COURT.

See JURISDICTION—See PROHIBITION, 1.

CREDITORS' RELIEF ACT.

1. *Certificate of Claim—Contestation*—R. S. O. ch. 65, sec. 10, sub-sec. 1—*Absconding Debtors' Act*—"Commencing Proceedings"—R. S. O. ch. 66, sec. 26.]—Although, under the Creditors' Relief Act, a creditor who

does not come in within the period prescribed, may not be entitled to rank for a dividend, he is interested in the proper distribution of the moneys realized, and is therefore under section 10 of the Act entitled to contest the certificates of claim of other creditors, for in case of success there may be a surplus available for him, or at least the liabilities of the common debtor will be reduced.

Per HAGARTY, C. J. O., and OSLER, J. A.—Making the affidavit of claim is not commencing proceedings within the meaning of section 26 of the *Absconding Debtors' Act*, R. S. O. ch. 66. Something to bring the claim within the control of the Court must be done before it can be said that proceedings have commenced.

Per MACLENNAN, J. A.—Making the affidavit is the first step directed by the Act, and if the further steps be then taken in good faith and without undue delay, the making of the affidavit may properly be regarded as the commencement of proceedings.

Quære, per MACLENNAN, J. A.—Whether proceedings against an absconding debtor under the *Absconding Debtors' Act*, R. S. O. ch. 66, must not still be commenced by writ of attachment.

Judgment of the County Court of Simcoe reversed. *Bank of Hamilton v. Aitken*, 616.

2. *Assignment for the Benefit of Creditors—Executions*—R. S. O. ch. 65.]—Creditors whose executions or certificates under the Creditors' Relief Act are placed in the sheriff's hands after the execution debtor has made a general assignment for the benefit of his creditors are not entitled to share, under that Act, in the proceeds of goods seized by the sheriff under prior executions before the assignment was made, the proceeds

being insufficient to pay these prior executions.

Roach v. McLachlan, 19 A.R. 496, applied.

Judgment of the County Court of Simcoe reversed. *Breithaupt v. Marr*, 689.

CROSSINGS.

See RAILWAYS, 4.

DAMAGES.

See ACTION — INSURANCE, 5 — MUNICIPAL CORPORATIONS, 2, 3 — NEGLIGENCE, 1—REVIVOR, 2.

DEBT.

See MUNICIPAL CORPORATIONS, 7.

DEBTOR AND CREDITOR.

See CREDITORS' RELIEF ACT — PARTNERSHIP, 2 — PRINCIPAL AND SURETY.

DEFAMATION.

1. *Slander—Privilege—Malice—Justification—Evidence—Pleading.*]—Pleading justification in an action of slander, where no attempt is made to prove the plea, is not in itself evidence of malice entitling the plaintiff to have the case submitted to the jury, the words in question having been spoken on a privileged occasion.

Judgment of the Common Pleas Division affirmed. *Corridan v. Wilkinson*, 184.

2. *Libel — Justification — Fair Comment—Pleading — Evidence.*]—Under a defence of "fair comment" in a libel action, evidence of the existence of a certain state of facts on which it is alleged the comment was fairly made is admissible, but not evidence of the truth of the statement complained of as a libel.

Wills v. Carman, 17 O. R. 223, discussed.

Judgment of the Chancery Division, 23 O. R. 223, reversed. *Brown v. Moyer*, 509.

DISCOVERY.

See EVIDENCE, 1.

DISTRESS.

See JUSTICE OF THE PEACE—LAND LORD AND TENANT.

DIVISION COURT.

See PROHIBITION, 2, 3.

DRAINAGE.

Municipal Corporations—By-law—54 Vic. ch. 51 (O.).]—Under the "Drainage Trials Act, 1891," 54 Vic. ch. 51 (O.), the referee has power to award either damages or compensation whether the case before him be framed for damages only or for compensation only, and on such a reference it is unnecessary to consider whether the by-laws in question are or are not invalid.

Reports of the referee upheld, BURTON, J. A., dissenting on the ground that in the one case there

was a reference of the action and not a transfer under 54 Vic. ch. 51, sec. 19, and that in the other case the reference was not within the Act:—

Held, by BURTON, J. A., that an action for negligence is not maintainable against the municipality unless the Council has interfered in or undertaken the construction of the work, and *quære* whether in such a case the members of the Council might not be personally liable. *Hiles v. Ellice, Crooks v. Ellice*, 225.

EJECTMENT.

See REVIVOR.

ELECTION.

See INSURANCE, 1.

ESTIMATES.

See MUNICIPAL CORPORATIONS, 7.

ESTOPPEL

See PARTNERSHIP, 1.

EVIDENCE.

1. *Discovery—Malicious Prosecution—Police Officer—Privilege.*—In an action for malicious prosecution against a police officer, arising out of a public prosecution initiated on an information sworn by him, he is not bound on an examination for discovery to give the name of the person from whom the facts were obtained.

Judgment of the Chancery Division, 21 O. R. 553, reversed. *Humphrey v. Archibald*, 267.

2. *Action for Negligence—Subsequent Action under Lord Campbell's Act—Identity of Issues—Examination de bene esse.*—Although the widow's right of action under Lord Campbell's Act is in several respects distinct from the husband's right of action in his lifetime arising out of the same circumstances, still the issues are so far connected and identical that the examination *de bene esse* of the husband in an action brought by him in his lifetime, but which abated at his death, is admissible evidence in the widow's action against the same defendants, the husband having been cross-examined by them.

Where it is desired to use depositions at a trial, the order that should be made is that the depositions be transferred to the clerk of assize or local registrar, the trial Judge being left free to decide as to their admissibility.

Judgment of the Queen's Bench Division, 22 O. R. 693, affirmed. *Erdman v. Town of Walkerton*, 445.

See ASSIGNMENTS AND PREFERENCES, 2—DEFAMATION, 1, 2—*Weegar v. Grand Trunk R. W. Co.*, 528.

EXAMINATION.

See EVIDENCE, 2.

EXECUTION.

See CREDITORS' RELIEF ACT, 1, 2—LANDLORD AND TENANT—LIMITATION OF ACTIONS, 3.

EXECUTORS.

See REVIVOR, 2.

EXEMPTIONS.

See MUNICIPAL CORPORATIONS, 5.

FAIR COMMENT.

See DEFAMATION, 2.

FENCES.

See RAILWAYS, 4.

FIRE INSURANCE.

See INSURANCE.

FORECLOSURE.

See ILLEGALITY—RAILWAYS, 2.

FOREIGN LANDS.

See JURISDICTION.

FOREIGN STATUTE.

See INTERNATIONAL LAW.

FORFEITURE.

See INSURANCE 1, 3, 4.

FRANCHISE.

See STREET RAILWAY.

GATES.

See RAILWAYS, 4.

HAWKERS AND PEDDLERS.

See MUNICIPAL CORPORATIONS, 6.

HORSE.

See NEGLIGENCE, 3.

ILLEGALITY.

Consideration—Mortgage—Foreclosure.—The rule of law which holds contracts made upon immoral consideration to be invalid is confined to executory agreements, and therefore to an action for foreclosure of a mortgage given to secure part of the purchase money of a house it is no defence to shew that the house has been purchased, to the vendor's knowledge, for use as a house of ill-fame. The plaintiff being able to make out the right to relief by production of the mortgage without disclosing the illegal transaction the defendant cannot set up the illegality as a defence.

Judgment of STREET, J., 21 O. R. 27, affirmed. *Hager v. O'Neil et al.*, 198.

IMPRISONMENT.

See JUSTICE OF THE PEACE.

INSPECTION.

See SALE OF GOODS, 2.

INSURANCE.

1. *Life Insurance—Note given for Premium—Nonpayment—Forfeiture—Election—Waiver.*—Under a policy of life insurance with a con-

dition that if any note given for a premium should not be paid at maturity the policy should be void, but the note should nevertheless be payable, the insurers are not bound on nonpayment of the note to do any act to determine the risk. In the absence of an election to continue the risk, it comes to an end and mere demands for payment of the note and a refusal during the currency of the note to accede to the insured's request for cancellation of the policy are not sufficient evidence to such election.

Judgment of the Queen's Bench Division, 22 O. R. 151, reversed, and that of STREET, J., at the trial, restored. *McGeachie v. North American Life Assurance Co.*, 187.

2. *Life Insurance — Benevolent Society—Initiation Ceremony—Condition Precedent.*—Where the constitution of a benevolent society provides that beneficiary certificates may be granted to persons who take a certain degree, all the steps laid down in the constitution in connection with the taking of that degree must be complied with before any beneficiary certificates can be legally issued.

Where, therefore, the holder of a certificate, though in all other respects duly qualified and accepted as a member of the degree in question, dies before actually going through the ceremony of initiation, the certificate is not enforceable.

Judgment of STREET, J., affirmed. *Devins v. Royal Templars of Temperance*, 259.

3. *Life Insurance — Premium Note—Action on After Forfeiture—Condition—Month.*—Under a life policy providing that "a grace of one month will be allowed in pay-

ment of premiums, at the expiration of which time, if said premium remain unpaid, this policy shall thereupon become void," and also that "if any note given on account of the premium be not paid when due this policy shall be void and all payments made upon it shall be forfeited to the company," the insurance comes to an end upon default in payment of a premium note, unless the insurers elect to keep it in force, and proceedings by the insurers to collect a note given for a premium are not sufficient evidence of such election. Nor are equivocal acts such as carrying the policy in the books of the insurers as an existing policy and including the amount in their official returns of insurance in force any evidence of waiver of the forfeiture, these acts not being known to the insured or intended to influence his conduct.

McGeachie v. North American Life Assurance Co., 20 A. R. 187, applied and followed.

"Month" in an insurance policy in the form here in question, with provisions for payment of *semi-annual* premiums on named days of *specific calendar months* means a calendar month.

Per HAGARTY, C.J.O., and OSLER, J. A.—*Semle*. Payment must be made during the life of the insured, and if the life drop before the expiration of the time of grace and before payment the risk comes to an end.

Per BURTON, and MACLENNAN, J.J.A. Payment may be made at any time before the expiration of the time of grace, whether the life has dropped or not.

Judgment of MACMAHON, J., reversed. *Manufacturers' Life Insurance Co. v. Gordon*, 309.

4. *Life Insurance — Premium Notes — Non-payment — Forfeiture — Conditions.*]—The assured gave to the company, to cover the first annual premium payable under a policy of life assurance containing no condition as to forfeiture for nonpayment of premiums, two instruments in the form of promissory notes payable at 90 days and 180 days from the date of the application, each containing a provision that if payment were not made at maturity the policy should be void. The first note was not paid at maturity, and while it was unpaid and before maturity of the second note the assured died :—

Held, HAGARTY, C. J. O., dissenting, that without any election or declaration of forfeiture on the part of the company the contract came to an end upon non-payment of the first note and was not kept alive by the currency of the other note.

McGeachie v. North American Life Assurance Co., 20 A. R. 187, and *Manufacturers' Life Insurance Co. v. Gordon*, 20 A. R. 309, applied.

Judgment of STREET, J., reversed.

Frank v. Sun Life Assurance Co., 564.

5. *Fire Insurance — Contract for Sale — Change of Title — Change Material to the Risk — R. S. O. ch. 167, sec. 114 — Damages.*]—The fact that the owners of an insured building have entered into an executory contract for the pulling down of the building in question and for the sale of the materials to the contractors at a sum very much less than the amount of the insurance is no bar to their right to recover the full amount of the insurance when the building is burnt down before the time fixed by the contract for the transfer of possession.

Judgment of MACMAHON, J., 22

O. R. 529, affirmed. *Ardill et al. v. Citizens' Insurance Company; Ardill et al. v. Aetna Insurance Company*, 605.

IDENTITY.

See WILL, 1.

INDEMNITY.

See MORTGAGOR AND MORTGAGEE.

INFANT.

See TRUSTS AND TRUSTEES.

INFORMATION.

See JUSTICE OF THE PEACE.

INTERNATIONAL LAW.

Foreign Statute — Action for Penalty.]—An action for a penalty incurred under a foreign law brought by a private individual in his own interest in the foreign country is not "penal" in the sense used in international law and may be enforced by action in this Province. The proper test whether an action is in such a sense penal is whether the proceeding is in favour of the State whose law has been infringed; if it is it cannot be enforced.

By a statute of the State of New York any of the officers of a corporation signing any certificate or report which shall be false in any material representation shall be liable for all the debts of the corporation contracted while they are officers thereof. The respondent,

while a director of a corporation organized under the laws of New York, signed a certificate containing representations which were material and false, and was sued in that State by the appellant, who was then a creditor, and judgment was recovered against him for the debt. On an action on this judgment in this Province:—

Held, that the action was maintainable.

Judgment of STREET, J., 17 O. R. 295, and of the Court of Appeal, 18 A. R. 136, reversed. (Privy Council) *Huntington v. Attrill*, Appendix, i.

INTERPLEADER.

See PROHIBITION, 1.

INTOXICATING LIQUORS.

Refusal to Admit Officer—Liability of License for Offence of Servant—R. S. O. ch. 194, secs. 112, 130.—*Per* HAGARTY, C. J. O., and MACLENNAN, J. A. Under section 112 of the Liquor License Act, R. S. O. ch. 194, the licensed hotel-keeper is personally responsible for the refusal of his servant to admit an officer claiming the right of search under section 130.

Per BURTON, and OSLEK, JJ. A. Section 112 does not apply to an offence of that kind, but is limited to offences connected with sale, barter, and traffic.

In the result the judgment of the County Court of Frontenac, quashing the conviction, was upheld. *Regina v. Potter*, 516.

JUDGMENT.

See LIMITATION OF ACTIONS, 3.

JURISDICTION.

1. *Replevin—Tax Collector—Venue—County Court—R. S. O. ch. 55, sec. 4—R. S. O. ch. 73, sec. 15.*—A tax collector sued for damages in respect of acts done by him in the execution of his duty is entitled to the benefit of R. S. O. ch. 73, and under section 15 of that Act, and section 4 of R. S. O. ch. 55, a County Court action against him for replevin of goods seized by him and for damages for malicious seizure, must be brought in the county where the seizure and alleged trespass took place.

The Consolidated Rules as to venue do not override these statutory provisions.

Legacy v. Pitcher, 10 O. R. 620, distinguished.

Arcott v. Lilley, 14 A. R. 283, applied.

Judgment of the County Court of Hastings reversed. *Howard v. Herrington*, 175.

2. *Redemption Action—Foreign Lands.*—A creditor who has recovered judgment in Manitoba, and who has by virtue of an act of that Province a lien on the lands of the judgment debtor there, cannot maintain in the Courts of Ontario an action against a mortgagee, for redemption of a mortgage on lands in Manitoba, which are subject to the lien.

Judgment of the Queen's Bench Division, 23 O. R. 327, reversed. *Henderson v. Bank of Hamilton*, 646.

See PROHIBITION, 2.

JURY.

See ACTION.

JUSTICE OF THE PEACE.

Summary Conviction—Information—Two Offences—“Defect in Substance or in Form”—Adjournment—Criminal Code, 1892, secs. 845 (3), 847, 857—Distress—Imprisonment—Liquor License Act, R. S. O. ch. 194, sec. 70.—An information stated that the defendant, “within the space of thirty days last past, to wit on the 30th and 31st days of July, 1892, * * did unlawfully sell intoxicating liquor without the license therefor by law required” :—

Per HAGARTY, C. J. O., and BOYD, C.:—Such an information does not charge two offences but only the single offence of selling unlawfully within the thirty days.

Per OSLER and MACLENNAN, JJ. A.:—Such an information does charge two offences and is in contravention of section 845 (3) of the Criminal Code, 1892.

But, *per Curiam*, assuming that an information so worded does contravene the provisions of section 845 (3) of the Criminal Code, 1892, the defect is one “in substance or in form” within the meaning of the curative section (847) and does not invalidate an otherwise valid conviction for a single offence.

The provision of section 857, that no adjournment shall be for more than eight days is matter of procedure and may be waived and a defendant who consents to an adjournment for more than eight days cannot afterwards complain in that respect.

A conviction for a first offence under section 70 of the Liquor License Act, R. S. O. ch. 194, properly awards imprisonment in default of payment of the fine, and not in default of sufficient distress.

Regina v. Smith, 46 U. C. R. 442,

and *Regina v. Hartley*, 20 O. R. 481, approved.

Judgment of the Queen's Bench Division, 23 O. R. 387, reversed. *Regina v. Hazen*, 633.

See Young v. Saylor, 645.

JUSTIFICATION.

See DEFAMATION, 1, 2.

LANDLORD AND TENANT.

Rent—Acceleration of Payment on Issue of Execution—Execution—Distress—Severance of Reversion—A condition in a lease that in case any writ of execution should be issued against the goods of the lessee the then current year's rent should immediately become due and payable, and the term forfeited is personal to the original lessor and lessee and does not run with the land, and cannot be taken advantage of by the grantee of part of the reversion.

OSLER, J. A. [dissenting], was of opinion that the acceleration clause was a covenant and not a condition, and formed part of the covenant to pay rent, merely accelerating it in a certain event, and so passed on the severance of the reversion enabling the grantee of part to distrain.

Judgment of ARMOUR, C.J., in the Divisional Court, affirmed. *Mitchell v. McCauley*, 272.

LEGACIES.

See WILL, 2.

LIBEL.

See DEFAMATION, 2.

LIFE INSURANCE.

See INSURANCE, 1, 2, 3, 4.

LIMITATION OF ACTIONS.

1. *Tenants in Common—Right of Entry—R. S. O. ch. 111.*]—Where there are several tenants in common of land, of whom all but one are in possession, and before the ten years have run, the latter acquires another undivided share from or under one of those in possession, the Statute of Limitations runs as to both shares from the time the last one was acquired.

Judgment of MEREDITH, J., reversed. *Hill v. Ashbridge*, 44.

2. *Mortgage—Payment—R. S. O. ch. 111, secs. 22 and 23—Bankruptcy and Insolvency—29 Vic. ch. 18, sec. 19.*]—The assignee in insolvency, under the Insolvent Act of 1865, of the plaintiffs' mortgagor, in 1869 conveyed in part satisfaction of his claim, without covenants on either side, the mortgaged property to a subsequent mortgagee, who had valued his security, the plaintiffs' mortgages being referred to in a recital. The subsequent mortgagee shortly afterwards conveyed the property to a third person, but notwithstanding this conveyance, continued to pay interest to the plaintiffs till within ten years of this foreclosure action:—

Held, on a case stated in the action for the opinion of the Court, with liberty to draw inferences of law and fact, that it was proper to infer that the provisions of section 19 of the Insolvent Act of 1865 had been complied with; that under that section the subsequent mortgagee taking over his security would be primarily bound to pay off the

prior encumbrances; and that therefore his payments kept alive the plaintiffs' rights.

Judgment of the Chancery Division, 21 O. R. 571, reversed, OSLEB, J. A., dissenting. *Trust and Loan Company of Canada v. Stevenson, et al.*, 66.

3. *Judgment—Execution—Accord and Satisfaction—Part Performance of Obligation—R. S. O. ch. 44, sec. 53 (7)—R. S. O. ch. 60, sec. 1—R. S. O. ch. 111, sec. 23.*]—A judgment remains in force for twenty years at least, the only limitation that can be applicable to it being R. S. O. ch. 60, sec. 1. In view of the amendment made in R. S. O. (1877) ch. 108, sec. 23, by the Revision of 1887, R. S. O. ch. 111, sec. 23, the English authorities, such as *Jay v. Johnstone* (1893) 1 Q. B. 189, and cases there cited, do not apply.

Boice v. O'Loane, 3 A. R. 167, followed.

Part payment of a judgment must, to be an extinguishment thereof, be expressly accepted by the creditor in satisfaction. Where, therefore, the judgment debtor forwarded to the solicitor of the judgment creditor a bank draft, payable to the solicitor's order, as payment "in full," and the solicitor endorsed the draft and obtained and paid over the moneys to the judgment creditor, but wrote refusing to accept the payment "in full," the judgment creditor was allowed to proceed for the balance.

Day v. McLea, 22 Q. B. D. 610, applied.

Sec. 53, sub-sec. 7, Judicature Act, as to part performance of an obligation in satisfaction, considered.

Order of the County Court of Wellington affirmed. *Mason v. Johnston*, 412.

LOCAL IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, 2.

LORD CAMPBELL'S ACT.

See EVIDENCE, 2.

MAINTENANCE.

See TRUSTS AND TRUSTEES.

MALICE.

See DEFAMATION, 1.

MALICIOUS PROSECUTION.

See EVIDENCE, 1.

MASTER AND SERVANT.

See INTOXICATING LIQUORS.

MAXIMS.

"*He who seeks Equity must do Equity.*"—*See* TRUSTS AND TRUSTEES.

"*Actio personalis moritur cum persona*"—*See* REVIVOR, 2.

See WORDS.

MESNE PURCHASER.

See MORTGAGOR AND MORTGAGEE.

MISNOMER.

See WILL, 1.

MORTGAGOR AND MORTGAGEE.

Indemnity—Mesne Purchasers—Parties—Practice.—The equitable doctrine of the right to indemnity of a vendor of land sold subject to a mortgage applies only as against a purchaser in fact, and therefore where at the request of the actual purchaser the land in question was conveyed to his nominee by deed absolute in form, but for the purpose of security only, this nominee was held not liable to indemnify the vendor.

It is not proper in an action for foreclosure to join as original defendants the intermediate purchasers of the equity of redemption, and to order each one to pay the mortgage debt and indemnify his predecessor in title.

Application of Consol. Rules 328, 329, 330, 331, 332, 333, discussed.

Lockie v. Tennant, 5 O. R. 52, approved.

Judgment of the Common Pleas Division reversed. *Walker v. Dickson et al.*, 96.

See ACTION—ILLEGALITY—JURISDICTION—LIMITATIONS OF ACTIONS, 2—RAILWAYS, 2.

MORTMAIN.

See WILL, 1.

MUNICIPAL CORPORATIONS.

1. *Bridges—Rivers—Waters—R.* *S. O. ch. 184, secs. 532, 534.*—Under sections 532 and 534 of the Municipal Act, R. S. O. ch. 184, county councils are directed to build and maintain "all bridges crossing streams or rivers over 100 feet in

width * * connecting any main highway":—

Held, per HAGARTY, C. J. O., and BURTON, J. A., agreeing with the Queen's Bench Division, that the width of the water in its natural flow at ordinary high water-mark was the test of the width of the stream or river for the purposes of the sections; and

Per OSLER, and MACLENNAN, JJ.A., that the width of the water at the highest or flood levels which are ordinarily reached every year was the width to be measured for bridge purposes.

In the result, the judgment of the Queen's Bench Division, 22 O. R. 193, was affirmed. *Village of New Hamburg v. County of Waterloo*, 1.

2. *Local Improvements—Ways—Damages—Benefit—Set-off—R. S. O. ch. 184, sec. 483.*—In an arbitration under the Municipal Act, R. S. O. ch. 184, sec. 483, it is proper to allow as against the amount of damages sustained by an owner of property by reason of the work in question, any enhancement in value to the property derived specifically from the work in question, notwithstanding that such enhancement in value is one common to all the property affected.

The amount assessed against the owner as his share of the cost of the work should be added to the damages or deducted from the set-off.

Judgment of STREET, J., 16 O. R. 726, affirmed; BURTON, J. A., dissenting. *In re Pryce and the City of Toronto*, 16.

3. *Arbitration and Award—Damages—Ways—Railways—R. S. O. ch. 184, sec. 531, sub-sec. 4.*—A railway company obtained permission

from a municipal corporation to run their line along a certain street, agreeing not to raise the grade to more than a certain height. They built the line and raised the grade of the street to more than the specified height, the corporation not consenting, but not taking any steps to prevent the violation of the agreement:—

Held, affirming the judgment of MACMAHON, J., that as against the plaintiffs, who were owners of property injuriously affected by the unauthorized raising of the grade, the railway company were liable in an action for damages; but—

Held, also, reversing the judgment of MACMAHON, J., [MACLENNAN, J. A., dissenting], that as against the corporation the plaintiffs were restricted to the remedy by arbitration, and that in any event the cause of action was not of such a nature as to entitle the corporation to bring in the railway company under section 531 (4) of R. S. O. ch. 184. *Baskerville v. City of Ottawa et al.*, 108.

4. *Bonus—By-law—Evasion of Act.*—A municipal corporation can not grant a bonus for promoting any manufacture, and what it cannot do directly it will not be allowed to do indirectly or by subterfuge.

Therefore a by-law, valid on its face, purporting to purchase a water privilege for electric lighting purposes, but shewn to be really a by-law to aid the owner of the water privilege in rebuilding a mill, was quashed.

Scott v. Corporation of Tilsonburg, 13 A. R. 233, applied.

Judgment of GALT, C. J., reversed. *In re Campbell and the Village of Lanark*, 372.

5. *Assessment and Taxes—Exemptions—Extension of Town—R. S. O. ch. 184, secs. 22, 54—Windsor Water Works—37 Vic. ch. 79, secs. 11, 12 (O.).*—The defendants were the owners of vacant land in the city of Windsor, abutting on streets in which mains and hydrants of the plaintiffs had been placed. The defendants had a water-works system of their own and did not use that of the plaintiffs, though they could have done so had they wished. The Commissioners imposed a water rate "for water supplied, or ready to be supplied" upon all lands in the city based upon their assessed value irrespective of the user or non-user of water :—

Held, that this rate was, under 37 Vic. ch. 79, secs. 11, 12, validly imposed.

The lands owned by the defendants were originally part of the township of Sandwich West, and by a by-law of that township, confirmed by special legislation, were exempted from taxation for ten years from the 1st of January, 1883. In 1888 the limits of the (then) town of Windsor were under the provisions of R. S. O. ch. 184, sec. 22, extended so as to embrace the lands in question :—

Held, that assuming that the water rate was a species of taxation, the effect of R. S. O. ch. 184, sec. 54, was to put an end to the exemption.

Municipality of Cornwallis v. Canadian Pacific R. W. Co., 19 S. C. R. 702, distinguished.

Judgment of County Court of Essex affirmed. *City of Windsor v. Canada Southern R. W. Co.*, 388.

6. *By-law—Hawkers and Peddlers—"Licensing, Regulating, and Governing"—Restriction as to Streets—R. S. O. ch. 184, sec. 495 (3).*—Under R. S. O. ch. 184, sec. 495 (3),

which provides that the council of any city may pass by-laws "for licensing, regulating, and governing" hawkers and peddlers, a city council may, acting in good faith, pass a by-law to prevent hawkers and peddlers from prosecuting their trade on certain streets.

Judgment of GALT, C.J., affirmed. *In re Virgo and the City of Toronto*, 435.

7. *By-law—Estimates—Debt—R. S. O. ch. 184, secs. 344, 357, 359.*—A municipal corporation has no power, without a by-law assented to by the electors, to enter into contracts involving expenditure not payable out of the ordinary rates of the current financial year, and resolutions for the execution of contracts for the building of a bridge, payment for which was to be made partly in the current financial year and partly in the next, were quashed as being a contravention of sections 344, 357 and 359 of the Municipal Act.

Judgment of ROSE, J., affirmed. *In re Olver and the City of Ottawa*, 529.

See ARBITRATION AND AWARD—DRAINAGE.

NEGLIGENCE.

1. *Contributory Negligence—Damages—Remoteness—Voluntary Incurring of Danger.*—Where a man, acting as a reasonable man would ordinarily do under the circumstances, voluntarily places himself in a position of danger in the hope of saving his property from probable injury and of preventing probable injury to the life or property of others, and sustains hurt, the person whose negligent act has brought about the

dangerous situation is responsible in damages.

Anderson v. Northern R. W. Co., 25 C. P. 301, distinguished and questioned.

Judgments of *Boyd, O.*, in the Divisional Court, and of *Street, J.*, at the trial, affirmed, *Burton, J.A.*, dissenting. *Connell v. Town of Prescott*, 49.

2. *Contributory Negligence—Bridge—Collision.*—The persons in charge of a vessel are bound when approaching at night a drawbridge, lawfully erected, to keep the vessel under complete control, and are not entitled to assume that the draw of the bridge is open or will be opened in time to let the vessel through. Therefore, if a vessel is allowed to approach so close to the bridge that collision with it cannot be avoided when the draw is found to be closed, damages are not recoverable from the bridge owners.

Judgment of the County Court of Hastings reversed, *Hagarty, C.J.O.*, dissenting. *Gilmour v. Bay of Quinte Bridge Co.*, 281.

3. *Highway—Horse.*—It is not negligence *per se* for the driver of a horse of a quiet disposition standing in the street to let go the reins while he alights from the vehicle to fasten a head weight, there being at the time little traffic and no noise or disturbance to frighten the animal; and the owner of the horse is not responsible for damages caused by the horse in running away when frightened by a sudden noise just after the driver has alighted.

Judgment of the County Court of York reversed. *Sullivan v. McWilliam*, 627.

See Weegar v. Grand Trunk R. W. Co. 528—EVIDENCE, 2—RAILWAYS 1—REVIVOR.

NOTARY.

See SOLICITOR.

NOVATION.

See PARTNERSHIP, 2.

ONUS OF PROOF.

See ASSIGNMENTS AND PREFERENCES, 2.

PART PERFORMANCE.

See LIMITATION OF ACTIONS, 3.

PARTIES.

See MORTGAGOR AND MORTGAGEE.

PARTNERSHIP.

1. *Use of Name—Holding Out—Estoppel.*—When a person, not in fact a partner, authorizes his name to be used in the firm name of a partnership there is a holding out of himself as a partner to any one who knows or has reason to believe that this represents the name of the person so authorizing its use, but a partnership by estoppel or by holding out will not be created if the real position of affairs is known to the creditor.

Judgment of the Common Pleas Division, 21 O. R. 683, reversed in part. *McLean v. Clark*, 660.

2. Debtor and Creditor—Novation—Collateral Security—Release.]

—A creditor of a partnership held a note of the firm with a mortgage as collateral security, on property of the firm, amply sufficient to secure his claim. Subsequently, with knowledge of the dissolution of the firm, at the request of one partner who had assumed the liabilities, and without the consent of or notice to the other, he discharged the mortgage, without payment of the note, in such a way as to vest the whole interest in the property, freed from the mortgage, in the continuing partner:—

Held, That he could not afterwards sue the retiring partner on the note.

Walker v. Jones, L. R. 1 P. O. 50, applied.

Judgment of Queen's Bench Division, 23 O. R. 288, reversed, *MACLENNAN, J.A.*, dissenting. *Allison v. McDonald*, 695.

See ASSIGNMENTS AND PREFERENCES, 1—SPECIFIC PERFORMANCE.

PAYMENT.

See LIMITATION OF ACTIONS, 2.

PENALTY.

See INTERNATIONAL LAW.

PLEADING.

See DEFAMATION, 1, 2.

POLICE OFFICER.

See EVIDENCE, 1.

PRACTICE.

See ATTACHMENT — CREDITORS' RELIEF ACT—DEFAMATION, 1, 2—*EVIDENCE*, 1, 2 — *JURISDICTION — MORTGAGOR AND MORTGAGEE—PROHIBITION—REVIVOR—SOLICITOR.*

PREMIUM NOTE.

See INSURANCE, 1, 3, 4.

PRESUMPTION.

See ASSIGNMENTS AND PREFERENCES, 2.

PRINCIPAL AND SURETY.

Satisfaction of Principal Debt—Release of Debtor—Release of Surety.]

—A creditor may by express reservation preserve his rights against a surety notwithstanding the release of the principal debtor, the transaction in such a case amounting in effect to an agreement not to sue, but if the effect of the transaction between the creditor and the principal debtor is to satisfy and discharge and actually extinguish the debt, there is nothing in respect of which the creditor can reserve any rights against the surety.

Judgment of the Chancery Division, 22 O. R. 235, reversed. *Holiday v. Hogan*, 298.

PRIVILEGE.

See DEFAMATION, 1—*EVIDENCE*, 1.

PROHIBITION.

1. *County Court—Sheriff—Interpleader—Rules 1141 (a), 1141 (b).*]

—A sheriff sued in the County Court by an execution debtor for \$100 damages, the value of implements seized and sold by the sheriff without any special direction from the execution creditor and alleged to be exempt, cannot obtain in that Court an interpleader order directing the trial of an issue between the execution debtor and the execution creditor, to settle whether the implements were exempt or not. The sheriff acts at his own peril in granting or refusing the exemption.

Prohibition granted, the County Court having no jurisdiction to make such an order.

Judgment of the Queen's Bench Division, 21 O. R. 624, reversed, MACLENNAN, J. A., dissenting. *In re Gould v. Hope*, 347.

2. *Division Court—Territorial Jurisdiction—Transfer—R. S. O. ch. 51, sec. 87—52 Vic. ch. 12, sec. 5 (O.).*

—Under R. S. O. ch. 51, sec. 87, as amended by 52 Vic. ch. 12, sec. 5 (O.), either party in a Division Court action may, after notice disputing the jurisdiction has been duly given, apply to have the action transferred to another Court. If no application be made, and if in fact there be jurisdiction, prohibition will not lie merely because the Judge has assumed that as no application for a transfer had been made he had jurisdiction, i.e., has not tried the question of jurisdiction. But if, in fact, there be no jurisdiction the objection still holds good, and prohibition will be granted.

Judgment of the Queen's Bench Division, 22 O. R. 583, affirmed. *In re Thompson v. Hay*, 379.

3. *Division Court—Delivery of Judgment—R. S. O. ch. 51, sec. 144.*]

—Prohibition will lie to restrain proceedings under a judgment delivered without the notice required by section 144 of the Division Courts Act, R. S. O. ch. 51.

In re Tipling v. Cole, 21 O. R. 273, approved.

Judgment of the Queen's Bench Division, 22 O. R. 568, affirmed, MACLENNAN, J. A., dissenting. *In re Forbes v. Michigan Central R. W. Co.*, 584.

PUBLIC POLIOY.

See ATTACHMENT.

RAILWAYS.

1. *Negligence—Ways—Crossing—Station Yard—51 Vic. ch. 29, sec. 256 (D.).*]

—A highway crossed the defendants' line at right angles; their passenger station lay adjacent to the highway on the east, and their shunting ground and yard adjacent to it on the west. The shunting yard was less than eighty rods in extent from the highway, and eight tracks crossed the highway with intervals of a few feet between them. The defendants in shunting a train of flat cars drew them from the east end to the west end of the yard, and after a pause backed them easterly. After backing for some distance the engine uncoupled from the train of cars, switched upon another track to the south, and the train and engine both continued to back down on different tracks to the highway, at a speed of about six miles an hour. At the time the plaintiff was proceeding along the highway from south to north and

was about to cross the tracks. The flat cars had reached the highway and were passing over it. The plaintiff, while watching these in front of her, did not see or hear the engine coming down on the other track, and was struck by the tender and injured. There was no look out man on the tender, and there was contradictory evidence as to the ringing of the bell at all, though at most it was not rung until the engine had run some distance towards the highway, and the whistle was not blown. The jury found that the accident was caused by the negligence of the defendants, and that the negligence consisted in not ringing the bell in time:—

Held, per HAGARTY, C. J. O., that there was sufficient in the general facts of the case to justify a verdict in favour of the plaintiff:—

Held, per OSLER and MACLENNAN, JJ.A., that whether section 256 of the Railway Act, 1888, applied or not under the circumstances of this case, the defendants did not object to its application by the trial Judge, and the jury having on contradictory evidence found negligence against them in not ringing the bell in passing over the distance from the starting point to the crossing, the verdict should not be interfered with.

Per BURTON, J. A.—That section 256 did not apply to shunting in a station yard, and that there had been misdirection on that point, but that the defendants had no right to use the highway as part of their station yard, and were therefore trespassers *ab initio* and liable for all damages resulting from their dangerous use thereof.

In the result the judgment of the Queen's Bench Division, 21 O. R. 705, was affirmed. *Hollinger v.*

Canadian Pacific Railway Company, 244.

2. *Mortgage—Arbitration—Rights of Mortgagees—Foreclosure—R. S. O. ch. 170, sec. 20 (25).*—A railway company took possession of certain lands under warrant of the County Court Judge, and proceeded with an arbitration with the owners as to their value. The lands were subject to a mortgage to the plaintiffs, who received no notice of, and took no part in, the arbitration proceedings, and gave no consent to the taking of possession. An award was made, but was not taken up by either the railway company or the owners. The plaintiffs brought this action against the railway company and the owners for foreclosure, offering in their claim to take the compensation awarded, and release the lands in the possession of the railway company:—

Held, that the railway company were proper parties to the action, and that the plaintiffs were entitled to a judgment against all the defendants with, in view of the offer, a provision for the release of the lands in the possession of the railway company on payment to the plaintiffs of the amount of the award.

Per OSLER and MACLENNAN, JJ.A.—Sub-section 25 of section 20, R. S. O. ch. 170, applies only where the compensation has been actually ascertained and paid into Court.

Judgment of GALT, C.J., reversed. *Scottish American Investment Company v. Prittie et al.*, 398.

3. *Ticket—Refusal to Pay Fare—51 Vic. ch. 29, sec. 248 (D.).*—A passenger who has paid his fare, and has lost his ticket, cannot be ejected from the train upon his failure to

produce his ticket for inspection by the conductor, there being upon the ticket no condition requiring its production, and no contract for its production having been entered into. That is not a refusal to pay his fare under 51 Vic. ch 29, sec. 248 (D.).

Judgment of the Queen's Bench Division, 22 O. R. 667, affirmed, OSLER, J.A., dissenting. *Beaver v. Grand Trunk R. W. Co.*, 476.

4. *Fences—Crossings—Gates—51 Vic. ch. 29, secs. 194 to 199 (D.).*—It is the duty of the railway company to make and duly maintain gates at farm crossings with proper fastenings, and the knowledge of the owner of the farm that the fastenings are insufficient, and his failure to notify the company of that fact, will not prevent him from recovering damages from the company if his cattle stray from his farm, owing to the insufficiency of the fastenings, and are killed or injured.

McMichael v. Grand Trunk R. W. Co., 12 O. R. 547, approved.

Judgment of the County Court of Elgin reversed. *Dunsford v. Michigan Central R. W. Co.*, 577.

See *Weegar v. Grand Trunk R. W. Co.*, 528.—MUNICIPAL CORPORATIONS, 3.

RECEIVER.

See TRUSTS AND TRUSTEES.

REDEMPTION.

See JURISDICTION.

REFERENCE.

See ARBITRATION AND AWARD.
93—VOL. XX. A.R.

RELEASE.

See PARTNERSHIP, 2.

REMOTENESS.

See NEGLIGENCE, 1.

RENT.

See LANDLORD AND TENANT.

REPLEVIN.

See JURISDICTION.

REVERSION.

See LANDLORD AND TENANT.

REVIVOR.

1. *Ejectment.*—An action of ejectment was brought in 1867 and was entered for trial in that year, but the trial was postponed. The original plaintiff died in 1871, having several years before conveyed the lands to a person who in 1888 conveyed to one M. In 1892 an *ex parte* order of revivor was obtained in the name of M. as plaintiff:—

Held, affirming the judgment of GALT, C. J., 22 O. R. 316, discharging the order of revivor, that the action was governed by C. S. U. C. ch. 27 and that it came to an end as soon as the conveyance to the present plaintiff's predecessor in title was made except perhaps as to costs, for which the original plaintiff might probably have proceeded. *Lemesurier v. Macaulay*, 421.

2. *Actio Personalis, etc.*—*Damages—Negligence—Executors*—*R. S. O. ch. 110, sec. 9.*—An action for injury to the person now survives to the executor of the plaintiff, who can, in case of his death *pendente lite*, on entering a suggestion of the death and obtaining an order of revivor, continue the action.

Judgment of the Common Pleas Division affirmed. *Mason v. Town of Peterborough*, 683.

REVOCATION.

See WILL, 2.

RIGHT OF ENTRY.

See LIMITATION OF ACTIONS, 1.

RIVERS.

See MUNICIPAL CORPORATIONS, 1.

RULES.

C. R. 935.]—*See* ATTACHMENT.

C. R. 1141 (a).]—*See* PROHIBITION, 1.

C. R. 1141 (b).]—*See* PROHIBITION, 1.

SALARY.

See ATTACHMENT.

SALE OF GOODS.

1. *Conditional Sale—Bills of Sale and Chattel Mortgages*—51 Vic. ch.

19 (O.).]—The lien of an unpaid vendor of a manufactured article is not invalidated if, without his direction or connivance, the purchaser paints out or obliterates the name and address of the vendor that were, pursuant to the Conditional Sales' Act, 51 Vic. ch. 19 (O.), properly marked on the article at the time of the conditional sale.

Semble: The instrument set out below in the form of a promissory note with conditions thereunder written is an instrument evidencing a conditional sale within the first and sixth sections of that Act.

Judgment of the County Court of Perth reversed. *Wettlaufer v. Scott*, 652.

2. *Sample—Inspection.*]—In a sale by sample of goods to be "laid down" at a certain place, inspection if desired must be made there, and if a proper opportunity of making inspection be afforded and the buyer refuse to inspect and demand that the goods be shipped to another place for inspection the seller is justified in treating this as a breach of contract.

Judgment of FALCONBRIDGE, J., reversed. *Oelrichs v. Trent Valley Woollen Manufacturing Company*, 673.

SALE OF LAND.

See SPECIFIC PERFORMANCE.

SAMPLE.

See SALE OF GOODS, 2.

SET-OFF.

See MUNICIPAL CORPORATIONS, 2.

SHERIFF.

See PROHIBITION, 1.

SLANDER.

See DEFAMATION, 1.

SOLICITOR.

Notary—Services as Agent—Conveyancing Charges—Taxation—Costs.]

— A solicitor, who is also a notary, and acting in the latter capacity obtains for a client the allowance of a pension from the United States Government, is entitled to charge for his services such sum as may be agreed upon, and is not bound by the statutory regulations affecting solicitors' charges, or liable to have his charges taxed.

The right to tax a solicitor's bill of charges for conveyancing in the absence of a special agreement, considered.

Judgment of the Queen's Bench Division reversed. *Ostrom v. Benjamin*, 336.

SPECIFIC PERFORMANCE.

Sale of Land — Partners — Abatement.]—Where a contract is made by one partner for the sale of partnership lands, to which the other partner refuses to consent, the purchaser cannot insist upon taking the share in the lands of the contracting partner with a proportionate abatement in the price.

Judgment of the Common Pleas Division, 22 O. R. 519, reversed. *Crain v. Rappale*, 291.

STATUTES.

C. S. U. C. ch. 27.]—*See* REVIVOR.

B. N. A. Act, secs. 91 (21), 92 (13).]—*See* CONSTITUTIONAL LAW.

29 Vic., ch. 18, sec. 19.]—*See* LIMITATION OF ACTIONS, 2.

37 Vic., ch. 79, sec. 11, 12 (O.).]—*See* MUNICIPAL CORPORATIONS, 5.

47 Vic., ch. 88, sec. 6 (O.).]—*See* WILL, 1.

R. S. O. ch. 44, sec. 53 (7).]—*See* LIMITATION OF ACTIONS, 3.

R. S. O. ch. 51, sec. 87.]—*See* PROHIBITION, 2.

R. S. O. ch. 51, sec. 144.]—*See* PROHIBITION, 3.

R. S. O. ch. 55, sec. 4.]—*See* JURISDICTION.

R. S. O. ch. 60, sec. 1.]—*See* LIMITATION OF ACTIONS, 3.

R. S. O. ch. 65.]—*See* CREDITORS' RELIEF ACT, 1, 2.

R. S. O. ch. 66, sec. 26.]—*See* CREDITORS' RELIEF ACT, 1.

R. S. O. ch. 73, sec. 15.]—*See* JURISDICTION.

R. S. O. ch. 109, sec. 24.]—*See* WILL, 2.

R. S. O. ch. 110, sec. 9.]—*See* REVIVOR, 2.

R. S. O. ch. 111, secs. 22, 23.]—*See* LIMITATION OF ACTIONS, 1, 2, 3.

R. S. O. ch. 124, sec. 2, sub-sec. 2 (a) and 2 (b).]—*See* ASSIGNMENTS AND PREFERENCES, 2.

R. S. O. ch. 124, sec. 5.]—*See* ASSIGNMENTS AND PREFERENCES, 1.

R. S. O. ch. 124, sec. 9.]—*See* CONSTITUTIONAL LAW.

R. S. O. ch. 167, sec. 114.]—*See* INSURANCE, 5.

R. S. O. ch. 170, sec. 20 (25).]—*See* RAILWAYS, 2.

R. S. O. ch. 183, sec. 8, sub-sec. 1.]—*See* COMPANY.

R. S. O. ch. 184, secs. 22, 54.]—*See* MUNICIPAL CORPORATIONS, 5.

R. S. O. ch. 184, secs. 344, 357, 359.]—*See* MUNICIPAL CORPORATIONS, 7.

R. S. O. ch. 184, sec. 483.]—*See* MUNICIPAL CORPORATIONS, 2.

R. S. O. ch. 184, sec. 495 (3).]—*See* MUNICIPAL CORPORATIONS, 6.

R. S. O. ch. 184, sec. 531, sub-sec. 4.]—*See* MUNICIPAL CORPORATIONS, 3.

R. S. O. ch. 184, secs. 532, 534.]—*See* MUNICIPAL CORPORATIONS, 1.

R. S. O. ch. 194, sec. 70.]—*See* JUSTICE OF THE PEACE.

R. S. O. ch. 194, secs. 112, 130.]—*See* INTOXICATING LIQUORS.

R. S. O. ch. 214, sec. 15.]—*See* ACTION.

R. S. O. ch. 237.]—*See* WILL, 1.

51 Vic. ch. 19 (O.).]—*See* SALE OF GOODS, 1.

51 Vic. ch. 29, secs. 194-199. (D.).]—*See* RAILWAYS, 4.

51 Vic. ch. 29, sec. 248 (D.).]—*See* RAILWAYS, 3.

51 Vic. ch. 29, sec. 256 (D.).]—*See* RAILWAYS, 1.

52 Vic. ch. 12, sec. 5 (O.).]—*See* PROHIBITION, 3.

54 Vic. ch. 20 (O.).]—*See* ASSIGNMENTS AND PREFERENCES, 2.

54 Vic. ch. 51 (O.).]—*See* DRAINAGE.

Criminal Code, 1892, secs. 845 (3), 847, 857.]—*See* JUSTICE OF THE PEACE.

STREET RAILWAYS.

Franchise—Property—Roadbed.
—Under the statutes and agreements affecting the Toronto Street Railway Company, the possibility of exercising the franchise beyond the period of thirty years therein mentioned if the city should not take over the railway, is not "property" the value of which could be taken into consideration by the arbitrators in arriving at the amount payable by the city on assuming the ownership of the railway.

Nor was the company entitled to any allowance for permanent pavements constructed by the city under an agreement by which the company in lieu of constructing and maintaining such pavements, as provided by former agreements, paid the city an annual allowance for the use thereof.

The company's rights in respect of the extensions of the railway made from time to time come to an end at the expiration of the thirty years mentioned in the original agreement.

Judgment of ROBERTSON, J., 22 O. R. 374, affirmed, BURTON, J. A., dissenting on the second point. *In re The City of Toronto and The Toronto Street Railway Company*, 125.

STREETS.

See MUNICIPAL CORPORATIONS, 6.
—NEGLIGENCE, 3.

SUMMARY CONVICTION.

See JUSTICE OF THE PEACE.

TAXATION.

See SOLICITOR.

TICKET.

See RAILWAYS, 3.

TENANTS IN COMMON.

See LIMITATION OF ACTIONS, 1.

TRUSTS AND TRUSTEES.

Will — Infant — Maintenance —
"He who seeks Equity must do Equity"—*Receiver.*]—Under a devise of land to a father "during his life, for the support and maintenance of himself and his (three) children, with remainder to the heirs of his body or to such of his children as he may devise the same to" there is no trust in favour of the children so as to give them a beneficial interest apart from and independently of their father, but the children being in needy circumstances will be entitled as against the father's execution creditor who has been appointed receiver of his interest to have a share of the income set apart for their maintenance and support, and in arriving at the share it is reasonable to divide the income into aliquot parts, thus giving one-fourth to the receiver.

Judgment of *BOYD, O.*, affirmed.
Allen v. Furness, 34.

VENUE.

See JURISDICTION.

WAIVER.

See INSURANCE, 1, 3, 4.

WATERS.

See MUNICIPAL CORPORATIONS, 1.

WAYS.

See MUNICIPAL CORPORATIONS, 2,
 3, 6—*NEGLIGENCE*, 3—*RAILWAYS*, 1
 —*STREET RAILWAYS*.

WILL.

1. *Mortmain—Methodist Church*
 —*R. S. O. ch. 237—47 Vic. ch. 88,*
sec. 6 (O.).—Misnomer—Identity.]—*Section 6 of 47 Vic. ch. 88 (O.)* does not confer upon the Methodist Church the powers of the Connexional Society of the Wesleyan Methodist Church in Canada to take by devise without reference to the restrictions of the Religious Institutions Act and a bequest to the Church payable out of realty, made by will executed within six months of the testator's death, was held void.

Smith v. Methodist Church, 16
O. R. 199, approved.

Per HAGARTY, C. J. O., and
MACLENNAN, J. A.—A gift or devise will not fail for a misdescription or an imperfect or inaccurate description of a legatee or devisee if the description is sufficient to designate with reasonable certainty the object of the testator's bounty. Therefore the Methodist Church may take under a gift to "The Missionary Society of the Methodist Church in Canada."

Judgment of *GALT, C. J.*, affirmed.
Tyrrell v. Senior, 156.

2. *Revocation—Revival by Codicil*
 —*Void Legacies*—*R. S. O. ch. 109,*
sec. 24.]—The testator made a will on the 14th of May, 1890, disposing

of all his estate, giving to certain charities specific proportions of the residue and naming three persons executors. In January, 1891, he made another will revoking all previous wills and making a number of specific devises and bequests, but leaving a large residue undisposed of. In March, 1891, he executed a codicil in which after stating that "I will and devise that the following be taken as a codicil to my will of the 14th day of May, 1890," he revoked the appointment of one of the named executors in that will "to be one of the executors of this my will" and in his stead appointed another person "with all the powers and duties * * * in my said will declared." The attestation clause stated that this was signed, etc., by the testator "as a codicil to his last will and testament":—

Held, [HAGARTY, C. J. O., dissenting], affirming the judgment of ROBERTSON, J., that there was shewn in this codicil an intention to revive the revoked will within the meaning of section 24 of the Wills Act, R. S. O. ch. 109:—

But *held* further, reversing the judgment of ROBERTSON, J., that the will so revived took effect as at the date of the codicil and that for the purpose of deciding as to the validity of the charitable bequests it must be treated as if executed at that date.

Holmes v. Murray, 13 O. R. 756, and cases of that class, where the

codicil in question refers to an existing will, distinguished.

Certain of the charitable bequests having therefore been held void it was further held that those that were good were not increased, but that the amount of the void bequests was distributable as in case of intestacy.

A legacy invalid because of the legatee's husband being a witness to the will was held validated by a reviving codicil witnessed by independent persons. *Purcell v. Bergin*, 535.

See TRUSTS AND TRUSTEES.

WINDING-UP.

See COMPANY.

WORDS.

"*Defect in Substance or in Form.*"]
See JUSTICE OF THE PEACE.

"*Franchise.*"—*See* STREET RAILWAYS.

"*Month.*"—*See* INSURANCE, 3.

"*Licensing, Regulating and Governing.*"—*See* MUNICIPAL CORPORATIONS, 6.

"*Property.*"—*See* STREET RAILWAYS.

See MAXIMS.

APPENDIX.

[PRIVY COUNCIL.] *

HUNTINGTON, PETITIONER.

AND

ATTRILL, RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

International law—Foreign statute—Action for penalty.

An action for a penalty incurred under a foreign law brought by a private individual in his own interest in the foreign country is not "penal" in the sense used in international law and may be enforced by action in this Province. The proper test whether an action is in such a sense penal is whether the proceeding is in favour of the State whose law has been infringed; if it is it cannot be enforced.

By a statute of the State of New York any of the officers of a corporation signing any certificate or report which shall be false in any material representation shall be liable for all the debts of the corporation contracted while they are officers thereof. The respondent while a director of a corporation organized under the laws of New York signed a certificate containing representations which were material and false, and was sued in that State by the appellant who was then a creditor, and judgment was recovered against him for the debt. On an action on this judgment in this Province:—

Held, that the action was maintainable.

Judgment of STREET, J., 17 O. R. 295, and of the Court of Appeal, 18 A. R. 136, reversed.

THIS was an appeal from the judgment of the Court of Statement.
Appeal for Ontario, reported 18 A. R. 136, dismissing by reason of an equal division of opinion, the appeal of the plaintiff from the judgment of STREET, J., reported (sub nom. *Huntingdon v. Attrill*), 17 O. R. 295, where, and in the present judgment, the material facts are stated.

Sir Horace Davey, Q. C., *Finlay*, Q. C., and *Pollard*, for the appellant.

The Attorney-General (*Sir Richard E. Webster*, Q. C.), *Gore*, and *Asquith*, for the respondent.

**Present.* THE LORD CHANCELLOR, LORD WATSON, LORD BRAMWELL, LORD HOBHOUSE, LORD MORRIS, and LORD SHAND.

Judgment. The judgment of their lordships was delivered on 17th February, 1892, by

**LORD
WATSON.**

LORD WATSON:—

The appellant, in June, 1880, became a creditor for money lent to the Rockaway Beach Improvement Company, Limited, which carried on business in the State of New York, being incorporated pursuant to chapter 611 of the State laws of 1875. Section 21 of the Act provides that, "If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof."

The respondent was, in June, 1880, a director, and in that capacity an officer of the company within the meaning of the statute. On the 30th of that month he, along with other officers of the company, signed and verified on oath, as prescribed by section 37, a certificate setting forth that the whole capital stock had, at its date, been paid up in cash.

In the year 1883, the appellant instituted a suit against the respondent before the Supreme Court of New York State for the unpaid balance of his loan to the company, alleging that the certificate contained representations which were material and false, and that the respondent had incurred personal responsibility for the debt as provided by section 21. The respondent defended the action, but, a verdict having been found against him, the Court, on the 15th June, 1886, gave final judgment, ordering him to pay to the appellant the sum of \$100,240.

Having failed to recover payment the appellant, in September, 1886, brought an action upon his decree in the Common Pleas Division of the High Court of Justice for the Province of Ontario, where the respondent resided. The only plea stated in defence was to the effect that the judgment sued on was for a penalty inflicted by the muni-

cipal law of New York ; and that the action being one of a penal character ought not to be entertained by the courts of a foreign State.

Judgment.

LORD
WATSON.

Mr. Justice Street, who tried the case, being of opinion that the enactments of section 21 were strictly punitive and not remedial, dismissed the action with costs. The Judges of the Appeal Court were equally divided in opinion, the result being that the appeal taken from his decision was dismissed. The Chief Justice (Hagarty) and Mr. Justice Osler were of opinion that the statutory remedy given to the appellant as a creditor of the company being civil only, and not enforceable by the State or by the public, was not a penal matter in the sense of international law. Mr. Justice Burton was of the same opinion, but held himself precluded from giving effect to it for reasons which he thus explains : " The courts of the State of New York have placed an interpretation upon this particular statute in which I should not have agreed, but those decisions are the law of the State of New York, and with that we are dealing. I am of opinion, therefore, that on that undisputed expert testimony this is a penal statute there, and the judgment obtained upon it cannot be enforced here." In the conclusion thus stated Mr. Justice Maclellan expressed his concurrence. But the learned Judge, in that respect agreeing with the Court of First Instance and differing from the other members of the Court of Appeal, held that the enactment was in itself undoubtedly penal, inasmuch as it was " passed in the public interest, providing a punishment for an offence," and that " it makes no difference that what it exacts from the offender is given to persons who are ordinary creditors of a company in payment of their respective debts."

Their Lordships cannot assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the Courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the statute of 1875 in the State of New York. They had to construe

Judgment.

LORD
WATSON.

and apply an international rule, which is a matter of law entirely within the cognizance of the foreign Court whose jurisdiction is invoked. Judicial decisions in the State where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The Court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a Court might find itself in the position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being strained to give effect to laws which were, in its own judgment, strictly penal.

The general law upon this point has been correctly stated by Mr. Justice Story in his "Conflict of Laws," and by other text writers; but their Lordships do not think it necessary to quote from these authorities in explanation of the reasons which have induced courts of justice to decline jurisdiction in suits somewhat loosely described as penal, when these have their origin in a foreign country. The rule has its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the Courts of any other country.

Their Lordships have already indicated that, in their opinion, the phrase "penal actions," which is so frequently

used to designate that class of actions which, by the law of nations, are exclusively assigned to their domestic *forum*, does not afford an accurate definition. In its ordinary acceptation, the word "penal" may embrace penalties for infractions of general law which do not constitute offences against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule. The phrase was used by Lord Loughborough and by Mr. Justice Buller in a well known case *Folliott v. Ogden*, 1 H. Bl. 123; and *Ogden v. Folliott*, 3 T. R. 734, and also by Chief Justice Marshall, who, in "*The Antelope*," 10 Wheat. 123, thus stated the rule with no less brevity than force,— "The Courts of no country execute the penal laws of another." Read in the light of the context, the language used by these eminent lawyers is quite intelligible, because they were dealing with the consequences of violations of public law and order, which were unmistakably of a criminal complexion. But the expressions "penal" and "penalty," when employed without any qualification, express or implied, are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceedings for the recovery of penalties, whether exigible by the State in the interest of the community, or by private persons in their own interest.

The Supreme Court of the United States had occasion to consider the international rule in *Wisconsin v. The Pelican Insurance Co.*, 127 U. S. 265. By the statute law of the State of Wisconsin, a pecuniary penalty was imposed upon corporations carrying on business under it who failed to comply with one of its enactments. The penalty was recoverable by the Commissioner of Insurance, an official entrusted with the administration of the Act in the public interest, one-half being payable into the State Treasury, and the other to the Commissioner, who was to defray the costs of the prosecution. It was

Judgment.

 LORD
WATSON.

Judgment. held that the penalty could not be enforced by the Federal Court, or the judiciary of any other State. In delivering the judgment of the bench, Mr. Justice Gray, after referring to the text books, and the *dictum* by Chief Justice Marshall already cited, went on to say: "The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanours, *but to all suits in favour of the State* for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties."

**LORD
WATSON.**

Their Lordships do not hesitate to accept that exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community.

The New York Statute of 1875 provides for the organization and regulation of corporations formed for the purpose of carrying on all kinds of lawful business with the

exception of certain branches therein specified. It confers rights and privileges upon persons who choose to form a trading association, and to become incorporated under its provisions, with full or with limited liability; and, in either case, it varies and limits the rights and remedies which, under the common law, would have been available to creditors of the association, as against its individual members. On the other hand, for the protection of those members of the public who may deal with the corporation, the Act imposes upon its directors and officers various stringent obligations, the plain object of which is to make known, from time to time, to all concerned, the true condition of its finances. Thus they are required (section 18) to publish an annual report, stating the amount of capital, the proportion actually paid in, the amount and nature of existing assets and debts, the names of the shareholders and the dividends, if any, declared since last report; and (section 37) to certify the amount of capital stock paid in within thirty days after payment of the last instalment. In both cases the consequence of the report or certificate being false in any material representation, is, that every director or officer who vouched its accuracy becomes, under section 21, liable personally for all the debts of the corporation contracted during his period of office.

Judgment

LORD
WATSON.

The provisions of section 21 are in striking contrast to the enactments of section 34, which inflicts a penalty of \$100 upon every director or officer of a corporation with limited liability, who authorizes or permits the omission of the word "limited" from its seal, official publications, or business documents. In that case, the penalty is recoverable "in the name of the people of the State of New York by the district attorney of the county in which the principal office of such corporation is located, and the amounts recovered shall be paid over to the proper authorities for the support of the poor of such county." It does not admit of doubt that an action by the district attorney would be a suit in favour of the State, and that neither the penalty, nor the decree of a New York Court for its amount, could be enforced in a foreign country.

Judgment.

LORD
WATSON.

In one aspect of them, the provisions of section 21 are penal in the wider sense in which the term is used. They impose heavy liabilities upon directors, in respect of failure to observe statutory regulations for the protection of persons who have become or may become creditors of the corporation. But, in so far as they concern creditors, these provisions are in their nature protective and remedial. To use the language of Mr. Justice Osler, they give "a civil remedy only to creditors whose rights the conduct of the company's officers may have been calculated to injure, and which is not enforceable by the State or the public." In the opinion of their Lordships, these enactments are simply conditions upon which the Legislature permits associations to trade with corporate privileges, and constitute an implied term of every contract between the corporation and its creditors.

A number of American authorities were cited in the course of the argument, which may be briefly noticed, seeing that they were made the subject of comment in both Courts below. With one exception, they do not appear to their Lordships to have a direct or material bearing upon the point raised in this appeal.

In *Stram Engine Company v. Hubbard*, 101 U. S. 188, the facts were these. The law of Connecticut, in the event of the president and secretary of a corporation intentionally neglecting to issue a certain certificate, made them jointly and severally liable "for all debts contracted during the period of such neglect." Under that provision an action was brought by a creditor of the corporation against its president, for a debt contracted before the period of neglect began, which remained unpaid during its continuance. There was no question as to enforcing the claim in another State. The Supreme Court of the States held that the enactment was penal, and therefore to be strictly construed; and also that the president was not liable, inasmuch as the debt was not contracted during the period of his default. The decision appears to be absolutely right; but their Lordships apprehend that

the canon of construction applied in that case would be equally applicable to the case of a penalty stipulated by bond, or in a mercantile contract.

Judgment.

 LORD
 WATSON.

Flash v. Conn, 109 U. S. 371, another decision of the Supreme Federal Court, was relied on by the appellant. In that case a New York Statute of 1848 had provided that, until the whole capital stock of the corporation was paid up, every stockholder should be liable to its creditors to an amount equal to the amount of stock held by them. It was decided that the claim of a creditor under that provision was contractual and not penal, and might therefore be enforced by an action at law. The result appears to be inevitable, because the liability was not imposed in respect of failure to perform any duty prescribed by the Act; but it throws no light upon the present question.

The respondent, in his argument, placed great reliance upon *Merchants' Bank v. Bliss*, 35 N. Y. 412, which was decided in 1866. The statute of 1848, already referred to, required the trustees of the corporation to make a report at a stated period, and, in the event of their failure to do so, rendered them jointly and severally liable for all its debts then existing, or which might be contracted before the report was actually made. The suit was by a creditor against a defaulting trustee, and the only question raised was this,—whether the action was for a “liability created by statute, other than penalty or forfeiture,” within the meaning of the Statute of Limitations, or “for a penalty or forfeiture, when action is given to the party aggrieved?” The Supreme Court of New York decided that the liability belonged to the second category, and that suit was consequently barred by the lapse of three years. In another case, *Wiles v. Suydam*, 64 N. Y. 173, the same Court held that a similar claim by a creditor, being for a statutory penalty or forfeiture, could not be joined in a declaration with a claim upon contract. Their Lordships see no reason to question the propriety of these decisions, but it is hardly necessary to say that a delict may

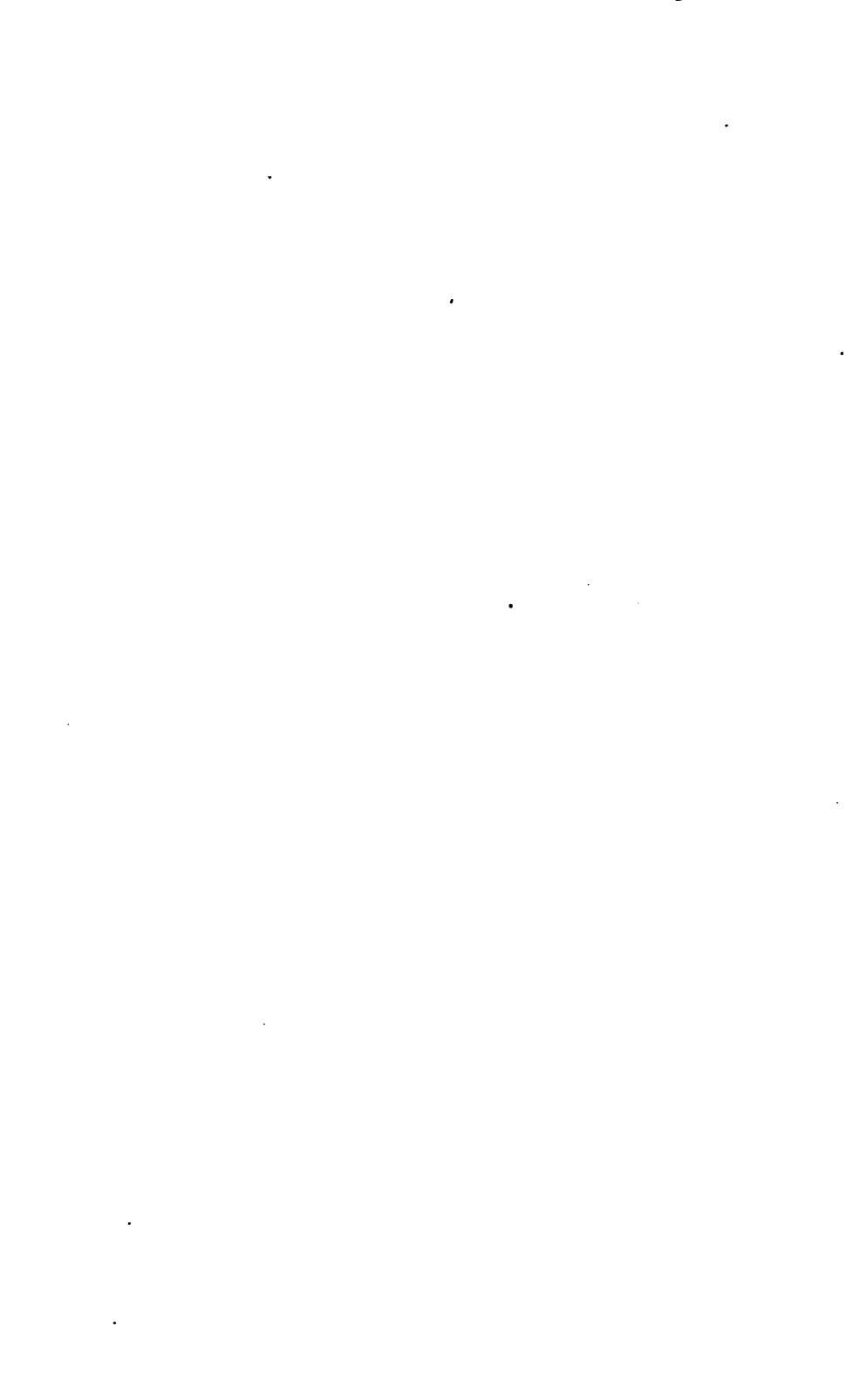
Judgment. give rise to a purely civil remedy, as well as to criminal punishment. Although a right of action is given to the party aggrieved, it does not follow that the law of nations must regard his action as a suit in favour of the State.

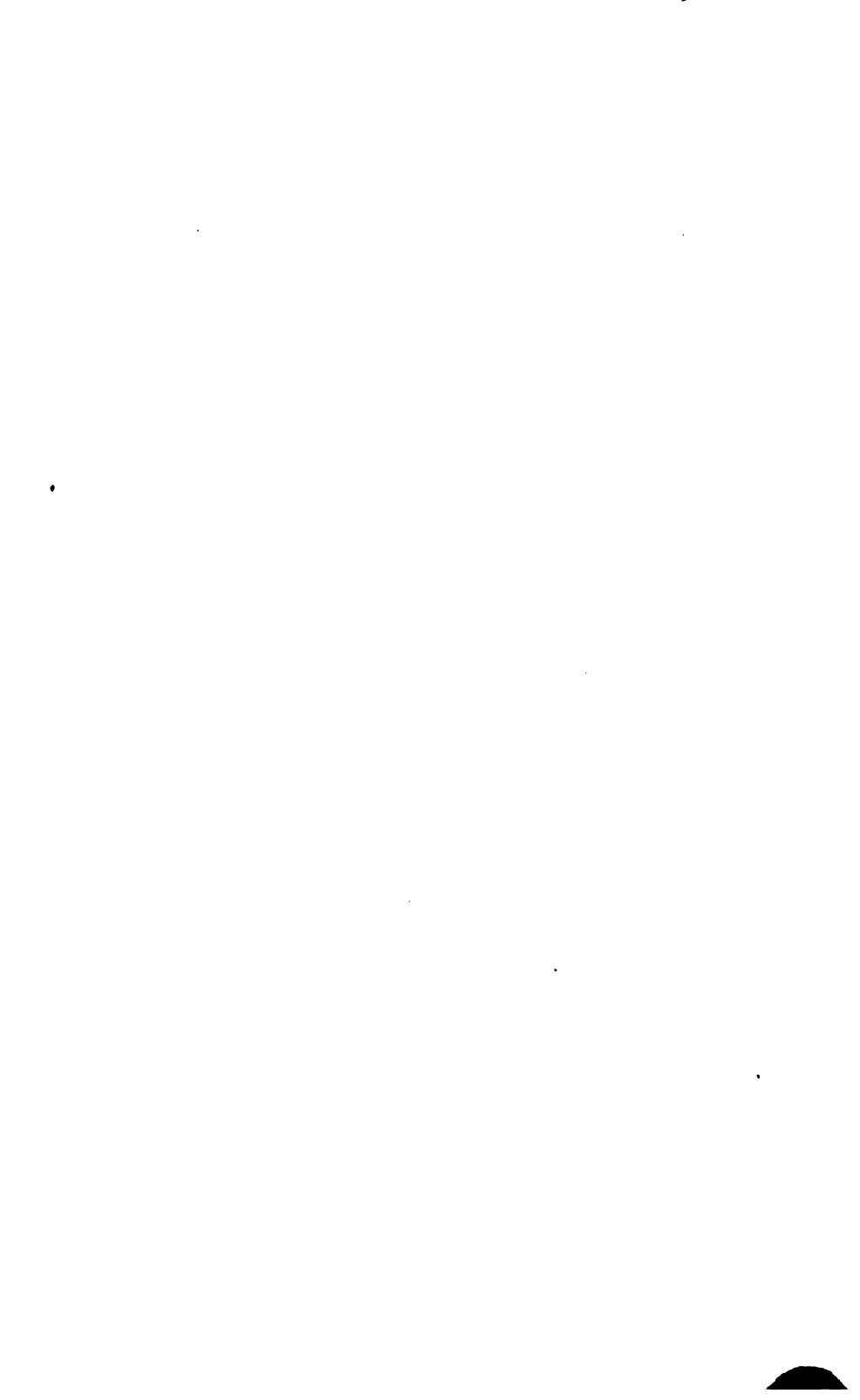
LORD
WATSON.

Attrill v. Huntington, 70 Md. 191, is, however, an authority upon the very point raised in this appeal. During the dependence of the present action the appellant preferred a bill in equity, before the Supreme Court of the State of Maryland, to set aside certain transfers of stock by the respondent, upon the allegation that they were fraudulently made in order to defeat his claims under the decree of June, 1886. The primary Judge granted the relief craved, but the Court of Appeal, by a majority of five judges against two, reversed his decision and dismissed the bill, holding that the decree, being for a penalty, could not be enforced beyond the limits of the State of New York. Their Lordships are constrained to differ from the reasons assigned by Mr. Justice Bryan in delivering the judgment of the majority, which do not appear to them sufficiently to recognize the distinction, from an international point of view, between a suit for penalty by a private individual in his own interest, and a suit brought by the Government or people of a State for the vindication of public law. The distinction is clearly pointed out in the opinion of the dissentient Judges as expressed by Mr. Justice Stone, in whose reasoning their Lordships concur.*

Being of opinion that the present action is not, in the sense of international law, penal, or, in other words, an action on behalf of the Government or community of the State of New York for punishment of an offence against their municipal law, their Lordships will humbly advise Her Majesty to reverse the judgments appealed from, and to give decree in favour of the appellant, with costs in both Courts below. The appellant must have the costs of this appeal.

* This decision was reversed by the Supreme Court of the United States, 12th December, 1902, now reported 146 U. S. 657.





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